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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 HERMÈS INTERNATIONAL, et al.,

5 Plaintiffs,

6 v.

7 22 Civ. 384 (JSR)

8 MASON ROTHSCHILD,

9 Defendant.
10

11 -----x
12 New York, N.Y.
13 January 30, 2023
14 9:30 a.m.

15 Before:

16 HON. JED S. RAKOFF,

17 District Judge
18 -and a Jury-

19 APPEARANCES

20 BAKER & HOSTETLER LLP
21 Attorneys for Plaintiffs
22 BY: DEBORAH A. WILCOX
23 OREN J. WARSHAVSKY
24 GERALD J. FERGUSON

25 HARRIS ST. LAURENT & WECHSCLER LLP
26 Attorneys for Defendant
27 BY: ADAM B. OPPENHEIM
28 JONATHAN A. HARRIS

29 LEX LUMINA PLLC
30 Attorneys for Defendant
31 BY: RHETT O. MILLSAPS, II

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1 (Case called)

2 (Case called)

3 THE DEPUTY CLERK: Counsel, please state your names
4 for the record.

5 MR. WARSHAVSKY: Oren Warshavsky, Baker Hostetler,
6 counsel for plaintiff Hermès.

7 Good morning.

8 THE COURT: Who are the other people at your table.

9 MR. WARSHAVSKY: Gerald Ferguson of Baker Hostetler;
10 Deborah Wilcox of Baker Hostetler; Nicholas Martin, who is the
11 client, and Lisa Gehman of Baker Hostetler.

12 MR. MILLSAPS: Good morning, your Honor. I am Rhett
13 Millsaps of Lex Lumina, PLLC, for defendant Mason Rothschild.

14 And here to my right is my cocounsel Jon Harris from
15 the law firm of Harris St. Laurent & Wechsler. And defendant
16 Mr. Rothschild is here to his right. Also from the Harris law
17 firm is Adam Oppenheim to his right and then directly behind me
18 is my partner Chris Sprigman from Lex Lumina.

19 THE COURT: Good morning. All witnesses except for
20 the two client representatives seated at the respective tables
21 are immediately excluded from this courtroom until they
22 testify. So if there's anyone in this courtroom now who is a
23 witness they need to leave right this moment.

24 Good.

25 Okay. Let's deal with the motions *in limine*.

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1 So the motion of Hermès to exclude the testimony of
2 Dr. Gopnik is granted.

3 The motion of Hermès to exclude the testimony of
4 Dr. Neal is denied.

5 The motion to bar mention of certain analogies, such
6 as the Warhol analogy, is denied in the abstract, but I am not
7 at all sure how either side is going to put that into evidence.
8 So, for example, since Dr. Gopnik's testimony is excluded, it
9 is not coming in through him. I suspect it may not be so
10 obvious that it comes in over hearsay and other objection, and
11 certainly no one can refer in opening or otherwise to something
12 that's not likely to be in evidence. Even if an expert were to
13 testify to it, of course, an expert can testify to matters not
14 yet in evidence as long as they would be admissible, and I am
15 not sure any of this would be admissible.

16 So while the motion is denied, as I say it is in the
17 abstract. That of course does not reach the issue of whether
18 or not any evidence will come into court that will allow making
19 those analogies.

20 The motion to exclude Trial Exhibits 593, 594 and 595
21 is granted.

22 Turning to defendant's motions, the motion to exclude
23 posts made on defendant's social media accounts is denied.

24 The motion to exclude the testimony of Boriana
25 Guimberteau is granted; and the motion, there are really two

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1 but they are both to exclude certain postlitigation statements
2 made by Mr. Rothschild, is granted.

3 So those are the rulings on the motions *in limine*.

4 Turning to objections -- oh, I should say this. All
5 my rulings on motions *in limine* of course are subject to the
6 exception if someone opens the door. So if Mr. Rothschild gets
7 up and testifies about certain postlitigation statements he
8 made, then he may open the door to the statements that I just
9 excluded. That is, I think, obvious.

10 When objections are made at trial, my practice is to
11 allow in front of the jury no more than three words, as
12 follows: "Objection," and either one or two words of the
13 ground, like "hearsay" or "foundation."

14 Or, if it is a little more complicated than that, then
15 you can invoke the relevant rule of evidence. So, "objection,
16 Rule 403."

17 If there's more to it than that, you can request a
18 sidebar, and I will, within limits, grant that. But I don't
19 want argument about objections in front of the jury.

20 With respect to timing, it's gotten a little more
21 complicated since we spoke on the phone.

22 We will sit today until 4:00.

23 We will sit tomorrow, Wednesday, and Thursday only to
24 3:30. However, we will not give the jury a midafternoon break.
25 So we will make up some of that lost time that we would have

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1 had if they had sat later.

2 And then we will sit on Friday to 4 or, if necessary,
3 until 4:30.

4 In light of that somewhat shortened schedule, as I
5 already indicated was likely, I am going to tell the jury that
6 the case will likely go over, may go over to early next week.

7 That is all on my list.

8 Anything you guys wanted to raise?

9 MR. HARRIS: Your Honor, should I stand?

10 THE COURT: No.

11 My wife doesn't stand when she addresses me. I don't
12 know why you should. But do speak into the microphone.

13 MR. HARRIS: Thank you, your Honor.

14 We have two or three interrelated issues of evidence
15 that we think are going to come up and will be implicated as
16 soon as the opening, and we want to get ahead of them so we
17 didn't interrupt the opening from Hermès' counsel.

18 THE COURT: Go ahead.

19 MR. HARRIS: The first issue is there are a lot of
20 text messages in this case.

21 THE COURT: Oh, yes. By the way, forgive me. I'm
22 sorry. It is my practice to, before openings, always give the
23 jury a very brief preliminary instruction describing in a rough
24 way what the case is about legally.

25 So let me hand or have my law clerk hand each side a

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1 copy of the preliminary instruction. While we are talking
2 about other things, someone from each side should look it over
3 and see whether there are any objections or additions that you
4 want to have.

5 But go ahead.

6 MR. HARRIS: Your Honor, there are a lot of text
7 messages in the case, and many of them involve Mason
8 Rothschild, who is the defendant. We don't object to
9 Mr. Rothschild's statements coming in, but some of these text
10 chains are quite long. I mean, I could hand one up, but this
11 is an example.

12 THE COURT: Sure. Hand it up.

13 Okay. So these are Plaintiff's Exhibit 111, is that
14 right? Or is it your exhibit?

15 MR. HARRIS: It should be Plaintiff's Exhibit marked,
16 your Honor.

17 THE COURT: Okay.

18 MR. HARRIS: It's Plaintiff's 306.

19 THE COURT: Why is it marked as Exhibit 111.

20 MR. HARRIS: I'm sorry. That is an old marking from
21 the deposition. We should have taken that off, your Honor.

22 THE COURT: Anyway, go ahead.

23 MR. HARRIS: So, for example, if Hermès wishes to show
24 a text from this to Mr. Rothschild, it's probably
25 unobjectionable, but I don't believe the entire document should

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1 come in.

2 THE COURT: I think that's likely the case.

3 What does that have to do with opening?

4 MR. HARRIS: So, I was doing two things, your Honor:

5 One Mr. Rothschild is going to testify relatively
6 early in the case, so I wanted to flag the issue for you.

7 The second thing is there are some things in opening
8 that Hermès has told us that they would like to use, which I
9 think are either double hearsay, or Mr. Rothschild repeating
10 something he heard from someone else.

11 THE COURT: Give me an example.

12 MR. HARRIS: Yes. So, Ashley, could you call up,
13 where would I find this, the one with "Noble says he will"?

14 It's 305, at 8.

15 Is that in here?

16 THE COURT: Is this part of this exhibit?

17 MR. HARRIS: Can we put it on your monitor, your
18 Honor?

19 THE COURT: That's fine. But is it part of this
20 exhibit?

21 MR. HARRIS: It is not.

22 THE COURT: It is a different exhibit?

23 MR. HARRIS: It is, your Honor.

24 Your Honor, this is part of a long text chain, and
25 here Mason Rothschild says, "Noble says he'll get the whales on

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1 it."

2 So that's double hearsay. We would object to that.

3 That is an example.

4 THE COURT: You can't really tell without the context.

5 Let me ask plaintiff's counsel, what are you saying
6 about this in your opening?

7 MR. WARSHAVSKY: Thank you, your Honor.

8 I think to the extent it is an objection about
9 hearsay, what we are offering this for is that Mason Rothschild
10 was communicating this, and our point on this is that Mason
11 Rothschild was get to get whales, or big investors, and that's
12 the reason we are doing this. Whether it's true that Noble
13 said it, when Noble said it, whether it was a lie when Noble
14 said it is almost irrelevant. The point is he's communicating
15 this to his other investors.

16 THE COURT: Who is Noble?

17 MR. WARSHAVSKY: Noble is an influencer.

18 THE COURT: Pardon.

19 MR. WARSHAVSKY: I believe he is an influencer that
20 Mr. Rothschild is working with.

21 THE COURT: If you don't even know who he is I don't
22 see how this can come in on opening.

23 Next?

24 MR. WARSHAVSKY: Well --

25 THE COURT: Sustained.

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1 Once I've ruled, I've ruled.

2 MR. WARSHAVSKY: I'm sorry.

3 MR. HARRIS: Your Honor, I did ask for them last
4 night. He did give them to us this morning, the list of text
5 messages he's planning on using in opening. It is a really
6 extensive list. It's about 30 messages, and I have had about
7 15 minutes to look at it. But I apologize, I can't raise for
8 your Honor right now all of the text messages that I find are
9 problematic, and I don't want to interrupt his opening.

10 THE COURT: Well, I am not quite sure what you are
11 saying, but it sounds like you are not making any further
12 objection at this time.

13 MR. HARRIS: I am not making any further objection.
14 But if there is something which comes up in the opening which I
15 think is objectionable, I guess I am asking how you would like
16 us to handle it.

17 THE COURT: So there are two different things you can
18 do. If you think it is so clearly objectionable, has no basis
19 in evidence and is prejudicial on its face, then you can object
20 right then and there. But you better be right, because it is
21 not good to interrupt counsel's openings on either side.

22 If it's something you are less certain about or you
23 feel is less material, then at the end of his opening you can
24 request a sidebar, and before we begin with your opening I will
25 hear you on that. If I have to instruct the jury to disregard

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1 something, I will.

2 MR. HARRIS: Thank you, your Honor.

3 And then the second thing on the text messages is when
4 Mr. Rothschild testifies as Mr. Warshavsky attempts to move
5 into or Hermès attempts to move into evidence something like
6 what I have handed you, I am probably not objecting to this. I
7 may or may not be objecting to specific text, but what I am
8 objecting to is the entirety of some 30-page chain coming in.

9 THE COURT: Let me find out from plaintiff's counsel.

10 Are you intending to put in the whole, in this case it
11 looks like 107 pages of an e-mail chain, which certainly shows
12 that the two people involved in messaging were digitally adept,
13 but in any event, are you planning to put it all in?

14 MR. WARSHAVSKY: We are planning to put in the whole
15 thing just so it is a complete document. We will be happy to
16 limit it to the pages, that page or the pages around it for
17 context.

18 THE COURT: All right. So at the first break, why
19 don't you discuss with the defendant's counsel how they would
20 like to limit it. That seems to me the right solution.

21 All right.

22 Anything else?

23 MR. HARRIS: Yes, your Honor. We have one additional
24 issue which, again, is going to come up in opening. There is a
25 number of newspaper articles that both sides want -- different

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1 articles.

2 THE COURT: I just excluded two of them.

3 MR. HARRIS: I know you did, your Honor.

4 THE COURT: Yes.

5 MR. HARRIS: Mr. Warshavsky told us last night that he
6 would like to put in an article from the New York Post and use
7 it in his opening, and we object to the article. It's hearsay.

8 THE COURT: Can I see it, please.

9 MR. HARRIS: Can you publish it?

10 MR. WARSHAVSKY: Do you have a copy of it?

11 THE COURT: Let's have plaintiffs show it to me.

12 MR. WARSHAVSKY: I am sorry, your Honor. It will be a
13 moment. I can also comment we are not offering this for the
14 truth of the matter asserted. We are offering this, as we are
15 with anything from the press, just for the fact that it is
16 stated, because this is a case about confusion.

17 THE COURT: The reason I excluded 593 and 594, even
18 though the same argument had been made, was that it is
19 expressly referred to this case. Indeed, the first article,
20 which was Defendant's Exhibit 593, and the relevant section was
21 a discussion of "two potentially significant cases will take
22 place early this year in the Southern District of New York."
23 The first one that's described is a case I never heard of,
24 *Adidas v. Tom Brown*, and then there's this one.

25 I think it is a 403 problem, since the discussion is

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1 in the context of this case. So any probative value is
2 outweighed by the prejudice. The same is also true, if I
3 recall correctly, although I will have to go back and look, but
4 anyway for 594.

5 So what is the one in the New York Post? I should say
6 that the articles that I just excluded, one was in the New York
7 Times; the second was in another journal. So I may have to
8 exclude the one from the New York Post on the grounds of equal
9 treatment of all publications, but let's seriously hear or see
10 what the article is.

11 MR. WARSHAVSKY: I am asking my colleague Ms. Gehman
12 to bring it up and show what we were going to show during
13 opening.

14 Your Honor, this was an article from last January,
15 before the case, and this was an article where the New York
16 Post credited Hermès, so that Mr. Rothschild's project was -- I
17 don't want to overstate it -- sponsored by or associated with
18 Hermès. I will get you the exact language. That's the reason
19 for using it.

20 THE COURT: I need to see the article.

21 MR. WARSHAVSKY: Yes.

22 She is obtaining it right now. I apologize, your
23 Honor.

24 THE COURT: While we are waiting on that, anything
25 else?

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1 MR. MILLSAPS: Your Honor, we have one other issue
2 about the preliminary instruction after reading.

3 THE COURT: Yes.

4 MR. MILLSAPS: So the problem instruction says the
5 plaintiff Hermès owned trademarks in the word Birkin and the
6 design or trade dress of the Birkin handbag and that the
7 company claims the defendant infringed and diluted these marks.
8 But Hermès actually in their proposed jury instructions filed
9 yesterday, this is Docket No. 137-1, they have a preliminary
10 instruction, the trademarks at issue, and in that preliminary
11 instruction, they say here Hermès asserts infringement, unfair
12 competition, dilution, and cybersquatting of the Birkin
13 trademark, meaning the word Birkin. Hermès also asserts unfair
14 competition over Mr. Rothschild's use of the Birkin trademark
15 and also use of the Birkin handbag trade dress. So it appears
16 they are not actually asserting dilution or infringement of the
17 trade dress.

18 THE COURT: Well, so you want me to say that the
19 company claims that the defendant Mason Rothschild infringed,
20 diluted, or otherwise engaged in unfair competition with
21 respect to these others?

22 MR. MILLSAPS: Well, the point is that they are only
23 claiming infringement and dilution on the Birkin word mark.

24 THE COURT: I understand that. I agree that that --
25 but I really wonder -- for example, I didn't put in anything

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1 because this is just a preliminary instruction, about
2 cybersquatting, even though that will be part of the final
3 instructions, assuming it makes it to the jury, because I want
4 to keep it simple.

5 But if you prefer, I will add the company claims the
6 defendant Mason Rothschild infringed, diluted, or otherwise
7 engaged in unfair competition with respect to one or more of
8 these marks.

9 Okay?

10 MR. MILLSAPS: Okay. Thank you, your Honor.

11 THE COURT: All right.

12 I assume the plaintiff has no objection to that.

13 MR. WARSHAVSKY: No objection, your Honor.

14 Your Honor, may I approach with the New York Post
15 article from last year?

16 THE COURT: Yes, you may.

17 MR. WARSHAVSKY: This is the article. It's page 89,
18 and this is the demonstrative exhibit.

19 THE COURT: Well, this clearly does show confusion.
20 Why should it not be part of opening statements?

21 MR. HARRIS: Your Honor, two reasons. First, it is
22 double hearsay. They are reporting what Elle says.

23 THE COURT: No, it is not being offered for its truth.
24 It is being offered for the fact that even the New York Post,
25 and I will admit that I am a great fan of the New York Post,

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1 but mostly its sports coverage, but, in any event, even the New
2 York Post got it wrong.

3 MR. HARRIS: The second reason, your Honor, the
4 stronger reason, and I believe we briefed this in the motions
5 *in limine*, is that the evidence of confusion has to be evidence
6 of confusion amongst consumers, and that evidence of confusion
7 in the press or reporters' questions is not actually valid
8 evidence of confusion in a trademark case.

9 So this is --

10 THE COURT: That is a more germane point. Let me hear
11 from plaintiff's counsel.

12 MR. WARSHAVSKY: Sure, your Honor.

13 First, evidence of actual confusion is not limited --
14 I think both sides briefed this -- it is not limited to just
15 purchasers. The whole test is the likelihood of confusion.
16 But actual confusion can be among anybody. I think we cited --
17 I'm trying to get it out, but we cited cases from --

18 THE COURT: Ultimately, it will have to be narrowed
19 down to consumers or potential consumers; but you're right that
20 other evidence of confusion is circumstantial evidence of
21 consumer confusion as well. So indeed the argument would be if
22 even a reporter who covers this area got it mixed up, the poor
23 consumer would surely get it mixed up or something like that.

24 What do you say to that?

25 MR. HARRIS: Your Honor, if I may allow Mr. Millsaps

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1 to answer that. He's more familiar with the case on that
2 issue.

3 THE COURT: Sure. Of course.

4 MR. HARRIS: Give us just one moment, your Honor. We
5 are just finding it from our motion *in limine*.

6 THE COURT: Yes.

7 The full sentence, so the record is complete, "Even
8 Hermès, the company responsible for the ridiculously expensive
9 Birkin bag," I would think you would be delighted to have that
10 in evidence, has entered the metaverse. "On December 17, the
11 company unveiled the MetaBirkin, a VR version of its signature
12 bag created by LA artist Mason Rothschild and made just a
13 hundred of them. There's something for both sides actually in
14 that, including the use of the term "artist" with respect to
15 Mr. Rothschild. But you are moving to exclude it.

16 So it is not being offered for its truth. It is being
17 offered for evidence of confusion. I think plaintiff's counsel
18 is right that evidence of confusion by other persons in the
19 area is relevant even though ultimately damage is determined by
20 consumer injury.

21 So I am inclined to overrule the objection. Okay?

22 MR. HARRIS: Okay, your Honor. Thank you.

23 THE COURT: Anything from plaintiff's counsel?

24 MR. WARSHAVSKY: No, your Honor. I have one question
25 about your *in limine* ruling if that's okay.

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1 THE COURT: Yes.

2 MR. WARSHAVSKY: You had made a ruling on posttrial
3 statements of Mr. Rothschild. Does that mean that those are
4 also excluded to challenge his credibility as well?

5 THE COURT: So that's why I mentioned if he opens the
6 door. But for at least the ones I saw the prejudice outweighed
7 the probative value if offered on your direct case. That's why
8 I excluded it there. If offered on cross-examination of
9 Mr. Rothschild, you'll need to overcome the fact that they
10 still seem to be quite prejudicial to Mr. Rothschild and of
11 limited probative value on impeachment.

12 Now, if he says something in his direct that opens the
13 door, that's one thing. If he doesn't, you may still offer
14 them, but only at the sidebar. So when you get ready to do
15 that, come to the sidebar and explain to me why my conclusion
16 of now, which is that the prejudicial impact considerably
17 outweighs their probative value, has now changed as a result of
18 whatever you say. Okay?

19 MR. WARSHAVSKY: Thank you, your Honor.

20 THE COURT: All right. Anything else?

21 MR. HARRIS: Defendants have nothing else, your Honor.

22 MR. WARSHAVSKY: There was one change to the
23 preliminary statement we showed to defendants. I am hopeful it
24 is not objectionable, your Honor.

25 Can I furnish it to you.

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1 THE COURT: Yes.

2 MR. WARSHAVSKY: I'm sorry. It is written three
3 times. I think if you just look to the bottom.

4 THE COURT: I did not put NFTs in my preliminary
5 instruction, although I am sure both sides in their opening
6 statements will refer to them, because I thought it would be
7 overly complicated to the jury on a very preliminary
8 instruction.

9 My preliminary instruction starts out, as you can see,
10 by saying this is just a brief comment on some of the issues in
11 this case, and you are going to get a much more detailed
12 instruction at the end of the case. So it was just a flag for
13 them some of the issues.

14 For example, in what you just handed up, you would add
15 "diluted these marks by creating and selling NFTs." If I am a
16 juror I might say, "What the heck is an NFT?" In fact, I think
17 that will be an issue that will occupy both sides on opening
18 statement, explaining to the jury what an NFT is, if I am not
19 mistaken, and I bet you can't do it in five words or less.

20 So that is why I didn't include it here. I am going
21 to hand this back to you.

22 MR. WARSHAVSKY: Thank you, your Honor.

23 THE COURT: Okay. Let's call the jury clerk and bring
24 up the jury panel. I want to give you guys a five-minute break
25 and then we will reconvene.

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1 The people in the back, when the jury panel is here,
2 they are going to have to sit in the front row so you are going
3 to need to move for now just to the back row you come back
4 later on after the jury panel is excused.

5 (Jury selection follows)

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1 THE COURT: OK. We are ready to swear you in.

2 (A jury of eight was impaneled and sworn)

3 THE DEPUTY CLERK: Jurors, if you would go out the
4 back of that jury box and use the aisle next to the windows and
5 go right into the door in front of you, which is your jury
6 room.

7 (Jury not present)

8 THE COURT: To the other members of the jury panel who
9 dodged a bullet, it is still very important that you have been
10 here because you never know how many jurors we're going to
11 need. So I appreciate deeply your willingness to be available
12 for jury service.

13 You should now go down to the room you came up from on
14 the ground floor, and my law clerk is going to call out right
15 now one of your names and will give that person the cards for
16 all of you, and that person will give the cards to the jury
17 clerk when you get downstairs.

18 Who is the person?

19 LAW CLERK: Mary Vargas.

20 THE COURT: Ms. Vargas, come on up and just get the
21 cards, and then everyone is excused.

22 Thank you, again.

23 (Venire excused)

24 So we'll start opening statements in ten minutes.
25 Anything else that counsel needs to raise with the court?

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1 MR. WARSHAVSKY: Your Honor, from the plaintiff, after
2 openings, the first witness will be testifying by video. Not
3 by video, by prerecorded video. It was the witness who is out
4 of town and unavailable.

5 THE COURT: I'll let the jury know that.

6 MR. WARSHAVSKY: We didn't know how you wanted us to
7 handle. There are two objections which we both waived.
8 Otherwise, we spliced it so there are no objections. We just
9 couldn't for those two because of when they arose. We didn't
10 know how your Honor, if your Honor wanted to discuss it with us
11 and/or how you wanted to handle the exhibits that we had
12 offered and agreed to during that testimony.

13 Should we just hand it up to you ahead of time?

14 What would be easiest?

15 THE COURT: Why are you starting with this witness?

16 MR. WARSHAVSKY: Because he's the New York Hermès --
17 it's kind of the introduction to the case.

18 THE COURT: All right.

19 MR. WARSHAVSKY: He's the CEO of Hermès.

20 THE COURT: Let me make sure I understand it.

21 So his testimony is -- and that is on consent of both
22 sides that he appear by video; yes?

23 MR. WARSHAVSKY: Yes.

24 THE COURT: So his testimony is going to be shown and
25 each of the jurors has their screen and the court has its

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1 screen, so you'll just put it up on the screen.

2 When there are exhibits, you need to put them up on
3 the screen. Maybe stop the testimony for a second, if these
4 are exhibits that are not being objected to but still have to
5 be received in evidence, and a number has to be given and the
6 court reporter has to put down what their number is.

7 So at that point we'll have to offer the exhibit by
8 number. The other side will indicate there's no objection.
9 I'll receive it. We'll show it on the screen, and then you'll
10 go back to the video.

11 Now there were, you say, two occasions?

12 MR. WARSHAVSKY: There were, but the parties --

13 THE COURT: They've disappeared?

14 MR. WARSHAVSKY: They've disappeared.

15 THE COURT: All right.

16 MR. WARSHAVSKY: The exhibits, I realize your Honor
17 wasn't there. We went through the process of offering, and
18 they were admitted at the time so that it would be clear on the
19 record for your Honor.

20 THE COURT: I don't know what that means, but just so
21 you guys understand.

22 MR. WARSHAVSKY: Correct.

23 THE COURT: The only exhibits in evidence are ones
24 that have been offered during the trial. I will then say any
25 objection? And if there is no objection, that will be so

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1 stated by the other side. And then I will say the magic word
2 received. If I don't say the word received, it's not in
3 evidence. OK?

4 Very good. See you in ten minutes.

5 (Recess)

6 THE DEPUTY CLERK: May I bring in the jury?

7 THE COURT: Please.

8 (Jury present)

9 Remain standing while the jury comes in.

10 Ladies and gentlemen, the jury people can all be
11 seated. Everyone else here stands up in honor of you. You can
12 be seated. The only person who doesn't stand up is me. That's
13 because I'm an old guy.

14 Now you can be seated.

15 So I've given you each a copy of a preliminary
16 instruction. I'm going to read it to you now, but also you can
17 take it with you to --

18 We're missing a juror.

19 THE DEPUTY CLERK: They just separated themselves.

20 THE COURT: Pardon?

21 JUROR: I'm in the wrong place.

22 THE DEPUTY CLERK: I thought you just separated
23 yourselves on purpose.

24 JUROR: My apologies.

25 THE COURT: There we are.

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1 We're going to read it together now, and then you'll
2 be able to take it with you into the jury room to consult, but
3 this is just a preliminary instruction. At the end of the
4 case, we'll have much more detailed instruction.

5 So before we begin to hear the evidence, I want to
6 give you a brief overview of the claims in this case. After
7 you have heard all of the evidence and the parties have made
8 their closing arguments, I will give you detailed instructions
9 of law that will displace this preliminary instruction and will
10 govern your deliberations.

11 This is a trademark lawsuit. A trademark is a word,
12 name, or symbol that indicates to consumers the source of a
13 good or work. A trademark's owner has the exclusive right to
14 stop others from (1) infringing the mark or using the mark in a
15 way that would confuse customers about who is behind a product
16 or work, and (2) diluting the mark or causing customers to
17 associate the mark with other products or works and thereby
18 undermining its distinctiveness.

19 The plaintiff, Hermès, owns trademarks in the word
20 Birkin and the design or trade dress of the Birkin handbag.
21 The company claims that the defendant, Mason Rothschild,
22 infringed, diluted, or otherwise engaged in unfair competition
23 with respect to one or more of these marks by creating and
24 selling a collection of digital images of fur-covered Birkin
25 handbags labeled MetaBirkins.

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Opening - Mr. Warshawsky

Because, however, MetaBirkins are at least in part legally protected artistic works, Mr. Rothschild cannot be held liable for any trademark violation, unless Hermès can prove that Rothschild's use of its trademark name was either not artistically relevant to the images or was explicitly misleading as to their source or origin, giving people the impression that the images were associated with Hermès.

Please remember that this preliminary instruction is simply a very brief overview of the claims in this case. I will give you more detailed, final instructions that will replace this overview and will govern your deliberations.

Now we're going to hear opening statements of counsel, and I want to caution you that nothing that counsel says is evidence. The evidence will come from the witnesses, from the exhibits, and from any stipulations that the parties enter into. So you may ask: Why do we even have opening statements? The answer is the evidence is going to come in one little bit at a time and, therefore, it may be useful for you to have an overview from the lawyers as to what they think the evidence will show or fail to show, as the case may be.

So we begin with plaintiff's counsel.

Each side has been given up to a half hour or opening statements.

MR. WARSHAVSKY: Thank you, your Honor.

May it please the court, members of the jury.

N1USHER2

Opening - Mr. Warshawsky

1 Good morning still. My name is Oren Warshawsky. As I
2 mentioned earlier, I represent Hermès. You're going to hear
3 that there are actually two companies here called Hermès. One
4 is the U.S. company and then there is also the French parent
5 company.

6 This case is about what Hermès believes are violations
7 of its trademark rights, as you've just heard. For almost 40
8 years, Hermès has been the manufacturer of the product called
9 the Birkin bag. Hermès owns a federally registered trademark
10 for the word Birkin. Hermès also owns a federally registered
11 trademark for the configuration of the Birkin bag.

12 Hermès alleges here, as you just heard, that
13 Mr. Rothschild infringed on its trademark rights when he
14 promoted and then sold a series of what is called non-fungible
15 tokens or NFTs, and they were called MetaBirkins. I'll explain
16 to you in a little bit in a few minutes about what an NFT is.

17 Now, generally speaking, when there is a trademark
18 case, as you see in your instruction, the claim is really
19 focused on whether or not consumers will be confused. And
20 Hermès brought this lawsuit because it thought that the
21 MetaBirkins NFTs infringed and they thought that the
22 MetaBirkins NFTs damaged the Birkin brand.

23 So let me start by telling you about Birkins
24 themselves. What I'm holding here is an Hermès Birkin bag.
25 First witness you're going to hear from is named Robert Chavez.

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Opening - Mr. Warshavsky

1 Mr. Chavez is the CEO of Hermès in New York. Now, Mr. Chavez
2 is away and unavailable. You're actually going to see a
3 recording of his testimony taken a few weeks ago.

4 Mr. Chavez will tell you a little bit about the Birkin
5 bag itself. He will explain that it takes 18 to 24 hours for a
6 highly skilled craftsman to make an Hermès Birkin bag. That
7 means about one to two Birkins per week per craftsman.

8 Mr. Chavez will also discuss with you the sales of the
9 Birkin bag in the United States. He will tell you that every
10 year, for the last ten years, Birkins have sold over -- Hermès
11 has sold over \$100 million worth of Birkin bags in the U.S.
12 alone. So over a billion dollars over the last decade.

13 You will hear a little bit about how Hermès markets
14 the Birkin. You will also hear about the media coverage that
15 the Birkin bag receives. That media coverage is anything from
16 magazines and newspapers to television series and movies.

17 Mr. Chavez will even tell you about an episode of the TV show
18 *Sex and the City*. That episode was filmed in the New York, in
19 Hermès' New York-based boutique, and Mr. Chavez helped
20 coordinate that episode. The episode was about a character on
21 the show purchasing a Birkin bag from that boutique. That was
22 what the whole show was about.

23 Mr. Chavez and then an individual named Nicolas
24 Martin, who is sitting at the table here, will both explain
25 that Hermès has a number of trademarks. The first, as I said

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Opening - Mr. Warshawsky

1 before, covers the word Birkin. The second covers the
2 configuration of the bag. Mr. Chavez will testify that the
3 Birkin bag is Hermès' most iconic product. You will hear the
4 name from Hermès' witnesses, including Mr. Martin.

5 You will also hear the following from the defendant
6 Mr. Rothschild.

7 (Video played)

8 As I explained, the accused product here is an NFT or
9 non-fungible token. Now I certainly don't know what they are,
10 or well enough to explain. And so after Mr. Chavez, you're
11 going to hear from Dr. Kevin Mentzer, who is going to explain
12 about NFTs. Dr. Mentzer is a professor of data science and
13 engineering technologies at Nichols College, and he is going to
14 explain exactly what a non-fungible token or NFT is. He will
15 also explain a little bit about how the blockchain works and
16 how non-fungible tokens are governed by something called a
17 smart contract.

18 But a smart contract is not really a contract. It's
19 not really smart. It's computer code that creates rules
20 governing NFTs, and you will see that the smart contract here
21 controls everything about the MetaBirkins NFTs. And you'll see
22 a piece of the code and you'll hear from Dr. Mentzer and
23 Mr. Rothschild himself that these non-fungible tokens, the code
24 themselves were indelibly marked and named MetaBirkins.

25 Now, the MetaBirkins are more than just a token and

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Opening - Mr. Warshawsky

1 code. The MetaBirkins NFTs that we talked about are associated
2 with digital files. There are 100 different MetaBirkins and
3 each was connected, MetaBirkins NFTs, and each was connected to
4 a digital file with an image. Here, I hope you're seeing one a
5 little bit close up. There are 100 different of these NFTs,
6 and each had an associated digital image or file like that.

7 After Dr. Mentzer, you're going to hear from Nicolas
8 Martin, Hermès' global general counsel. Mr. Martin will tell
9 you about Hermès the parent company. It's the one from France.
10 Mr. Martin is going to tell you a little bit about the history
11 of the company which dates back to 1837, when Hermès began by
12 creating leather products for equestrian uses, such as horse
13 saddles, bridles, things like that.

14 Over time, obviously, Hermès expanded to what it has
15 become now which is a fashion house, providing itself on making
16 only the highest quality goods. Mr. Martin will explain to you
17 the value of the Birkin handbag to Hermès. He will also
18 explain the value of the Birkin trademarks to Hermès.
19 Mr. Martin will show you a number of different bags. We have
20 two more in court here. There is this one, which is called at
21 tropical. There is this one here which is called the sunset.

22 Mr. Martin will explain that the Birkin bags come in
23 every color with a number of designs and will take you through
24 several more that are in the exhibits that we don't have in
25 court but you'll see pictures of. Included in those were

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Opening - Mr. Warshawsky

1 artworks placed on the bags and some of these are
2 collaborations with outside artists, sometimes inside internal
3 artists. Mr. Martin will show you other Birkin bags and
4 provide you some of the descriptions of media. Finally,
5 Mr. Martin will explain to you why Hermès had concerns with
6 Mr. Rothschild's MetaBirkins project and why Hermès brought
7 this lawsuit.

8 After Mr. Martin, you'll hear from Mr. Rothschild
9 himself. Mr. Rothschild will tell you about his background.
10 You'll see that Mr. Rothschild's first creative project was
11 printing the name of art colleges on Champion T-shirts. You'll
12 hear from Mr. Rothschild that his actions were not authorized
13 by those schools, such as Parsons which is on your screen. And
14 you will hear that Parsons at that time sent Mr. Rothschild a
15 cease and desist letter.

16 Now, you're going to hear that word a few times, cease
17 and desist letter. That means different things to different
18 people. Generally, a cease and desist letter is something that
19 is sent from somebody who thinks they own a right to someone
20 else who they think may have violated the right, asking them to
21 cease from that conduct, and to desist from doing it in the
22 future. That's why it is called, in shorthand, a cease and
23 desist.

24 You will see that Mr. Rothschild explained to two of
25 his business associates that he doesn't think people realize

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Opening - Mr. Warshavsky

1 how much you can get away in art by saying "in the style of."
2 You will hear that Mr. Rothschild's biggest project through at
3 least the first half of 2021 was called Baby Birkin. That NFT
4 project was an animation of a fetus growing inside a Birkin.
5 You will hear that was a financially lucrative project for
6 Mr. Rothschild.

7 Now, you're also going to hear that Mr. Rothschild
8 didn't create these or generate these images himself. Instead,
9 Mr. Rothschild hired someone named Mark Durham, you'll see here
10 referred to as Mark Design. Mark Design generated the images
11 for all of Mr. Rothschild's NFT projects through the
12 MetaBirkins. In fact, you'll hear the MetaBirkins were created
13 with software called Houdini, the same software used for prior
14 NFT projects by Mr. Rothschild.

15 You will see communications where Mr. Rothschild
16 actually asked Mark Design what the project software is, saying
17 he wanted to learn how to use it. The text you're seeing
18 occurred while Mark Design was actually generating the images
19 for the MetaBirkins here. You'll see that Mr. Rothschild, in
20 trying to entice Mark Design to participate in the MetaBirkins
21 projects writes, We are sitting on a gold mine. I'm a
22 marketing king.

23 Now, the name MetaBirkins was not adopted at the
24 beginning of this project. You'll see during this process,
25 Mr. Rothschild repeatedly referred to his NFT projects as

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Opening - Mr. Warshawsky

1 Birkins. Here, you see Mr. Rothschild cites to Mark Design,
2 Let's do another series of Birkins. You'll also see
3 Mr. Rothschild writing to another potential business associate,
4 Doing a new set of Birkins.

5 You will see that to make the images themselves, Mark
6 Design used a three-dimension schematic of an Hermès Birkin
7 bag, and even that the markup here was made using Hermès'
8 orange color and Hermès' logo to create a sample. You will
9 also see Mark Design provided Mr. Rothschild with a number of
10 samples of patterns or signatures to put the images on these
11 Birkin bags.

12 Mr. Rothschild also sent similar patterns to Mark
13 Design, and you will see that Mark Design then imprinted with
14 various fur types and images to create what is now the 100
15 MetaBirkins images. Mr. Rothschild's goal was to make as many
16 of the Birkin NFTs as possible. At one point he asked Mark
17 Design if he can crank out 100 Birkins. You will also see
18 Mr. Rothschild later failed to disclose Mark Design's
19 involvement, and even took credit for the work done by Mark
20 Design.

21 As I mentioned, Hermès takes the position that other
22 than the word Hermès, it's most famous trademark is Birkin. It
23 brought this lawsuit because it thought that people would
24 wrongly think that Hermès was involved with this MetaBirkins
25 project.

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Opening - Mr. Warshawsky

1 While the MetaBirkins NFT project was being developed,
2 Mr. Rothschild spoke to others suggesting that he might develop
3 a relationship with Hermès. For example, when introducing the
4 project to Mark Design, Mr. Rothschild says, We might need some
5 help from Hermès themselves.

6 (Continued on next page)

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Opening - Mr. Warshawsky

1 You will also see that Mr. Rothschild told his friend
2 and sometimes collaborator Eric Ramirez that Hermès might
3 partner with him on the MetaBirkins and that he was
4 negotiating.

5 You will see that when Mr. Rothschild was exploring a
6 collaboration for the still-unnamed Birkin project, one
7 potential collaborator asks whether it is official with Birkin
8 and Mr. Rothschild responded, "Pushing for it."

9 You will see that in talking to business associates
10 Mr. Rothschild indicated that he had contacted Vogue, who would
11 help him with Hermès, and then with the same business
12 associates said that he planned to work with Sotheby's to
13 connect him to Hermès.

14 You will see that there are other times that
15 Mr. Rothschild suggested he was either talking to or
16 negotiating with Hermès. You will also hear that none of these
17 discussions or negotiations ever happened, not one.

18 Now, until this time, Mr. Rothschild was calling this
19 project Birkins. You will see that on October 29, 2021, while
20 Mark Design was working on completing the images,
21 Mr. Rothschild took to Twitter and teased one of the bags and
22 ran a contest. And here he says, "Releasing 50 one-of-a-kind
23 Birkins of varying rarity. The collection needs a name. Share
24 this post and reply with your suggestion. Best suggestion gets
25 gifted a Birkin."

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Opening - Mr. Warshavsky

1 And you will see that various people had submissions.

2 A little later on that same day, October 29, someone
3 named McKissa responded with seven suggestions. The fourth was
4 MetaBirkin.

5 Now we know that Mr. Rothschild eventually adopted the
6 MetaBirkin name. We also know that the MetaBirkin collection
7 was released about a month later, on December 2, 2021. And on
8 December 3, 2021, we see McKissa asking Mr. Rothschild whether
9 she would be getting an NFT because she came up with the name.
10 Mr. Rothschild will testify that he did not give McKissa the
11 NFT because he came up with the MetaBirkin name himself. Also
12 in this contest you will see that another user responded with a
13 suggestion not your mom's Birkin.

14 And you will see that on Mr. Rothschild's MetaBirkin
15 website he used the slogan, "Not your mother's Birkin" to
16 advertise the MetaBirkins on his website. Mr. Rothschild will
17 also testify that he did not provide that user with any of his
18 Birkins or MetaBirkins.

19 Mr. Rothschild's promotion also included issuing a
20 blog post, posting a blog post on November 22, where he
21 explained that he knew he had to try and recreate the same
22 exclusivity and demand of Hermès' most famous handbag. His
23 goal was for MetaBirkins to double as an investment for holders
24 like the real world holy grail handbag.

25 Mr. Rothschild took to social media, including

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Opening - Mr. Warshavsky

1 Twitter, Instagram, and Discord creating MetaBirkin presences
2 on each. Those were separate from his own account, which he
3 also used to promote MetaBirkins.

4 During this time Mr. Rothschild also began working on
5 accessories for his MetaBirkins. Nicholas Martin will explain
6 to you that one of the Hermès's products is a horse charm which
7 goes by the name rodeo.

8 You will hear that Hermès sells that rodeo charm to
9 put on various items, including the Birkin bag. You will see
10 that Mr. Rothschild sent a picture of that horse charm, the
11 Hermès horse charm, to Mark Design and asked Mark Design to
12 create an image based on that to give to individuals that
13 purchased MetaBirkins. You will also see that Mark Design
14 created an image and Mr. Rothschild later teased this design on
15 his Instagram account.

16 You will also see that in the time leading up to the
17 minting of the MetaBirkins, Mr. Rothschild was actively seeking
18 people to help him promote the collection. You will see that
19 he often used words like "pump" and "shill," which meant to
20 promote.

21 You will see that he was seeking people that he called
22 whales, whales who were people that would bid more money and
23 raise the floor price. So you will see that Mr. Rothschild
24 offered to provide influencers with MetaBirkins for free or for
25 a very low price if they would either pump or shill for him.

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Opening - Mr. Warshavsky

1 He would talk to friends and others about getting them
2 to pump and shill. You will see that he repeatedly asked an
3 influencer to shill the MetaBirkins, promising that influencer
4 that the value of the MetaBirkins the NFT would raise -- here
5 he thought it would be to 50, which meant 50 ether,
6 cryptocurrency, or about \$200,000 at that time. He also asked
7 to get NFT investors, the whales, to set the floor price, what
8 he kept referring to as sweep the floor.

9 You are also going to hear from another expert, named
10 Scott Kominers. Dr. Kominers is a professor at Harvard
11 Business School who specializes in cryptocurrency and digital
12 marketing. Dr. Kominers will explain to you that in his
13 opinion the MetaBirkins NFTs are branded NFTs. Dr. Kominers
14 will explain that in his opinion in the case of a branded NFT
15 it is the brand name and the brand identification that is
16 responsible for the sale of the NFT.

17 You will see that Mr. Rothschild often used the
18 MetaBirkin name the way others use a brand name. You will see
19 that he tweeted at the time the name of three collections:
20 Bored Ape, Doodles, and MetaBirkins. Dr. Kominers will explain
21 in his opinion Bored Ape and Doodles are branded NFTs, meaning
22 that the reason people purchased those NFTs what was because
23 they were part of a broader brand.

24 You will see that when the MetaBirkins were originally
25 sold to the public and minted, they were not connected to the

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Opening - Mr. Warshawsky

1 images we saw before. While those images did exist on
2 Mr. Rothschild's website, the only image that people saw when
3 they were making the purchase was that of a shrouded bag. You
4 will see that, while the original purchase price was .1 eth, or
5 about \$450 at the time, some people immediately resold their
6 MetaBirkin NFTs.

7 You will also hear that during the initial sale
8 several people purchased these shrouded objects for several
9 thousand dollars, paying as much as \$42,000 for what at the
10 time was this shrouded image.

11 Dr. Kominers will explain that in his opinion the
12 reason for these kinds of sales in these amounts of money is
13 because of the Birkin name. Once the MetaBirkins were
14 released, a number of people believed that Hermès was involved
15 in the MetaBirkins. You will hear about articles in the
16 Financial Times, Elle Magazine, and other fashion magazines,
17 and even the New York Post.

18 You will see that they thought that Hermes was
19 involved with the MetaBirkins. Here you can see a New York
20 Post article that even after Hermès and Mr. Rothschild both
21 said that Hermes was not involved in the MetaBirkins, the New
22 York Post, along with publishing pictures of a couple of
23 MetaBirkins, wrote, "Even Hermès, the company responsible for
24 the ridiculously expensive Birkin bag, has entered the
25 metaverse. On December 17, the company unveiled a MetaBirkin,

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Opening - Mr. Warshawsky

1 a VR version of its signature bag."

2 You will see that Mr. Rothschild texted to one of his
3 friends, "Sorry, was doing BOF interview." BOF is Business of
4 Fashion Magazine. He says, "Bro, it's crazy. Apparently the
5 word around the media world is that this is a press stunt by
6 Hermès, and I'm like paid by Hermès."

7 You will also see that Mr. Rothschild sent another
8 text saying, "L'Officiel," which is a French fashion magazine,
9 "thought that the MetaBirkins were an official Hermès thing."

10 Mr. Rothschild explained what he was doing and what
11 his goals were in the Yahoo Finance interview we played a clip
12 from before. After saying that there was nothing more iconic
13 than the Birkin bag that we just heard, Mr. Rothschild said he
14 wanted to see whether he could create the same illusion that
15 the Birkin had in real life as a digital commodity, and then
16 that he wanted to garner the attention of people and build that
17 relationship with the consumer.

18 Let's listen to that.

19 (Video played)

20 MR. WARSHAVSKY: Shortly after this, Mr. Rothschild
21 started to tease more MetaBirkins. He told potential investors
22 that he was working on 900 more. He asked Mark Design how many
23 they could make and that he was hoping to pump up the volume.

24 Mr. Rothschild told investors he planned on doing a
25 TikTok campaign, "Finally got my Birkin."

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Now, you will see that Mr. Rothschild was confronted more than once with the possibility that Hermès might object to his actions. For example, in November 2021, before the MetaBirkins were released, a friend asked him whether there were any potential legal issues, and Mr. Rothschild responded that a cease and desist letter, the kind of letter I was talking about earlier, would be helpful.

And in fact, you will hear that after Mr. Rothschild's release of the MetaBirkin, the interview on Yahoo Finance, the teasing of more MetaBirkins, the horse, Hermès actually then sent a cease and desist letter to Mr. Rothschild.

Instead of abiding by Hermès's request, you will see that Mr. Rothschild decided to notify everyone that Hermès had sent the cease and desist letter. You will see that though Hermès never published it or published anything about it Mr. Rothschild did. You will see that he even joked with his investors that he planned to make an NFT out of the cease and desist letter. Mr. Rothschild published open letters to Hermès and even at the end of it threatened to sue Hermès.

Mr. Martin will explain that Hermès's position is that the MetaBirkin interfered with Hermès's plans. More important, because Mr. Martin is not involved in the day to day of those plans, you are actually going to hear from an individual named Maximilien Moulin.

Mr. Moulin will explain that Hermès was focusing on

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1 NFTs for the last several years and that in 2021, before the
2 MetaBirkins were released, he created a presentation detailing
3 a number of use cases.

4 He will also show you that at the direction of Hermès,
5 there was a presentation of a Birkin-related NFT in June 2021
6 and that a prototype of that NFT was created. He will explain
7 that Hermès is being very deliberate and focused on the highest
8 quality, as it always does, but that it has an NFT in the works
9 and has had a few of them in the works actually, but one has
10 already been -- has been distributed internally and it's likely
11 to be released later this year.

12 You will also hear from another Hermès employee,
13 Ambre-Elise Binoche. Ms. Binoche will tell that you Hermès
14 works with digital artists all the time and what her thoughts
15 are on Hermès entering the metaverse.

16 You will also hear from Dr. Bruce Isaacson, a survey
17 expert. Dr. Isaacson conducted a survey to determine whether
18 potential NFT purchasers, that is, people who are in the market
19 to buy NFTs, would be confused into believing that the
20 MetaBirkins were actually offered by Hermès.

21 Dr. Isaacson will explain that there was an 18.7
22 percent confusion rate among that group of individuals, and
23 Dr. Isaacson will testify that this indicates a substantial
24 likelihood of consumer confusion.

25 You will hear from Mr. Rothschild's publicist, Kenneth

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1 Loo, that a number of people contacted him because they thought
2 that Mr. Rothschild's project was affiliated with Hermès.

3 You will also see how the MetaBirkins have fared. You
4 will see that most of the highest prices came before the shroud
5 was lifted. You will see that the prices went down until one
6 of the influencers pumped -- or shilled, or whatever we are
7 going to call this -- the MetaBirkins, at which time the prices
8 climbed up.

9 Then you will see that after the Financial Times did
10 an article saying that Hermès was not involved with the
11 MetaBirkins, the prices started to diminish.

12 You will further see that the prices continued to
13 diminish after Mr. Rothschild discussed Hermès's cease and
14 desist letter and then as he discussed this lawsuit. And in
15 the end Hermès will argue that Mr. Rothschild violated Hermès
16 trademark rights, or Mr. Rothschild's own profit.

17 Hermès will ask you to find that by selling and
18 promoting the MetaBirkins NFTs, Mr. Rothschild engaged in
19 trademark infringement, dilution, and unfair competition and
20 ask that you return a verdict in Hermès' favor.

21 Thank you for giving me your attention.

22 THE COURT: All right. Thank you very much.

23 Now we will hear from defense counsel.

24 MR. MILLSAPS: Your Honor, if I may, would it be okay
25 for me to speak from this point, so I can see the screen along

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1 with the jurors?

2 THE COURT: That's fine.

3 MR. MILLSAPS: Thank you.

4 Thank you, your Honor. Good morning.

5 Good morning, members of the jury.

6 I Just want to introduce myself again and

7 Mr. Rothschild's team here. I am Rhett Millsaps, from the law
8 firm Lex Lumina, here on behalf of the artist Mason Rothschild.
9 With me are my cocounsel, Jon Harris. You will be seeing him
10 as well from the law firm of Harris, St. Laurent & Wechsler.

11 Also with us are Monica Delgado, who works with his
12 firm; Ashley Robinson, also who works with his firm; Adam
13 Oppenheim, also with the Harris firm; and then my partner at
14 Lex Lumina, Chris Sprigman.

15 And, of course, this is the defendant, Mr. Rothschild.

16 Mason, would you please stand up for a minute.

17 Members of the jury, Mr. Rothschild is an
18 up-and-coming artist and an entrepreneur, and he's here today
19 to stand up for himself and for artistic freedom. And you will
20 be hearing directly from him on the witness stand.

21 Now, you just heard Hermès' version of this dispute
22 and its view of Mr. Rothschild as the plaintiff. Hermès gets
23 to go first throughout this case. I will ask you to keep your
24 minds open until you have heard all of the evidence and from
25 all of the witnesses, including Mr. Rothschild.

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Opening - Mr. Warshavsky

1 And Mr. Rothschild and our team and I am sure everyone
2 in the courtroom today would very much like to thank you for
3 being here. We know that you are putting in a lot of effort
4 and time to serve as juror in this case, and we are grateful
5 for that.

6 I just would like to show you again the holy object
7 that brings us all here today in the courtroom.

8 Mr. Warshavsky, may I borrow this bag?

9 MR. WARSHAVSKY: Sure.

10 MR. MILLSAPS: Thank you.

11 Hermès was kind enough to let me borrow this to show
12 it to you. This is Hermès' most popular product, but not
13 everyone can get one. Not only is there a waitlist to buy one,
14 but the cheapest one of these bags is going to set you back
15 about \$12,000. Some of these bags go for as much as \$200,000.

16 And you heard Mr. Warshavsky say Hermès has sold over
17 a billion dollars of these bags in the last ten years in the
18 U.S. alone, about \$100 million worth of these bags every year
19 for the last ten years.

20 You also heard Mr. Warshavsky say that there are a lot
21 of cultural references to the Birkin bag in television shows
22 like *Sex and the City*, *Gilmore Girls*, and films and music that
23 you may have heard from Cardi B or Beyoncé.

24 That is because -- and Hermès is very proud of this --
25 the name Birkin has transcended its status as a mere trademark

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Opening - Mr. Warshawsky

1 indicating the source of goods, and Birkin has become a
2 cultural symbol of rarefied wealth and privilege in our
3 society.

4 Now, as you can see here, it is a leather purse, a
5 very fancy French leather purse, but it is a purse. You can
6 carry your wallet and your keys in it.

7 Ashley, would you please put the MetaBirkins on the
8 screen.

9 The images that you see on your screen now are
10 MetaBirkins. They're flat digital pictures of imaginary Birkin
11 bags fully covered in cartoonish colorful fur sitting on a
12 white pedestal. During this trial you will hear
13 representatives of Hermès admit that Hermès has never made or
14 sold anything that looks like this. It came out of
15 Mr. Rothschild's imagination.

16 And you will learn something obvious, but something
17 very important in this case. MetaBirkins exist only on your
18 screen in two dimensions. You can't carry them to the store.
19 You can't put your keys or your tiny dog in them. You can't
20 even do any of those things with a MetaBirkin in a digital
21 world, like a video game. It is a flat digital picture like a
22 painting connected to an NFT.

23 Now, you will be hearing a lot about NFTs during this
24 trial. An NFT is just a snippet of code on a public internet
25 register called a blockchain. That's so everyone can trace and

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Opening - Mr. Warshawsky

1 see when an NFT was created and who owns it now and what its
2 ownership history has been.

3 The easiest way to think of an NFT is like a deed or a
4 certificate of title, but it's digital. It's called a token
5 because it represents something else, just like a deed to a
6 house represents the house or a certificate of title represents
7 the car that's owned.

8 You will see that an NFT, like a deed, doesn't have
9 any inherent nature or value by itself. An NFT derives its
10 value from whatever it is attached to. Just like the deed to a
11 house would be meaningless if the house didn't exist.

12 You are going to hear that over the last few years
13 NFTs have become an exciting new way for artists to sell their
14 work and build audiences and engage with their communities.

15 A little over a year ago, Mr. Rothschild came up with
16 the idea to make a series of digital pieces of art depicting
17 imaginary fur covered Birkin bags and to sell them with NFTs.
18 He decided to call these artworks MetaBirkins.

19 Now, before I go any further, I just want you to
20 understand why we are all here today. Hermès, this
21 multibillion dollar fancy French purse maker, has sued
22 Mr. Rothschild because Hermès says that these MetaBirkins NFT
23 artworks hurt its coveted Birkin brand.

24 The evidence is going to show you otherwise. This
25 really is a case about a multibillion dollar corporation trying

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Opening - Mr. Warshavsky

1 to punish Mr. Rothschild because they don't like his art, and
2 they are scared of what it might show about luxury consumer
3 culture.

4 Now, there are three key facts in this case.

5 Fact one: The MetaBirkins on your screen are art, and
6 Mr. Rothschild had an artistic intention in using the name
7 MetaBirkins for this series of NFT artworks. You can see the
8 name MetaBirkins describes what you see on your screen. They
9 are artworks depicting imagery Birkin bags.

10 Mr. Rothschild also wanted to make money with his art.
11 Hermès will want you to focus only on the money part and ignore
12 the art part. But you will see from the evidence that both of
13 those things were true at the same time. They are two sides of
14 the same coin. Mr. Rothschild wanted to make art and he wanted
15 to make money and a name for himself with his art. What you
16 see on your screen is art.

17 Fact two: Mr. Rothschild wanted the credit for
18 MetaBirkins. He set up a MetaBirkins website and social media
19 accounts that identified him as the creator of MetaBirkins. He
20 identified himself as the creator of MetaBirkins in media
21 interviews.

22 He reached out to some reporters to correct them when
23 they mistakenly wrote articles saying that Hermès put out
24 MetaBirkins. And maybe more important than the evidence that
25 you will see is what you won't hear. You won't see any

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Opening - Mr. Warshawsky

1 evidence that Mr. Rothschild ever told anyone that MetaBirkins
2 came from Hermès, because he wanted the credit for his own
3 artwork.

4 Fact three: Consumers who pay tens of thousands of
5 dollars for luxury handbags like Birkin bags or NFT art were
6 not confused about where MetaBirkins came from. Hermès own
7 evidence is going to show this to you.

8 Hermès is going to try to make a big deal out of the
9 fact that Mr. Rothschild hoped to make money with MetaBirkins.
10 They are going make a big deal out of the fact that he put a
11 lot of effort into trying to pump up the price and the
12 excitement for his MetaBirkins art. They are going to make a
13 big deal about the fact that he told his associate that he
14 hoped he could get Hermès to collaborate with him.

15 Mr. Rothschild doesn't dispute any of that. It is all
16 true. It is perfectly legal for people to make money with
17 their art. In fact, the First Amendment of our Constitution
18 protects that right for every American. And you will hear from
19 Hermès' own witness that it is not unusual for artists to
20 approach Hermès to pitch a collaboration with them, because
21 they want to work with Hermès.

22 We are here today because trademark rights are limited
23 by the First Amendment, which protects artistic creations like
24 Mr. Rothschild's MetaBirkins. The First Amendment's guarantee
25 of freedom of speech and expression protects the right for any

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Opening - Mr. Warshavsky

of us to depict and comment on the things that we see in the world around us, including the trademarked products and brands that bombard us everywhere we look, especially products that have become significantly and widely discussed symbols in our culture, like the Birkin bag.

Also -- and I will talk more about this later -- nobody was confused about what they were buying when they bought the MetaBirkins NFTs and artworks. I would like to talk to you for a minute about Mr. Rothschild.

Who is Mason Rothschild? During this trial you are going to learn a good bit about Mr. Rothschild. I think that you will learn that there is a lot to like about him. But you will see some of Mr. Rothschild's flaws as well else a human being as you can see sitting here. You will learn that Mr. Rothschild is a clever, passionate, sometimes even funny guy who has lots of ideas, lots of ambition, and he works hard to bring his ideas into reality.

Like many people, he isn't just one thing. He is an artist, he is an entrepreneur, he's a businessman, he is a clever marketing guy. He's also a fiance and a devoted dog dad.

You will see that he cares a lot about using his art to draw attention to social issues that he cares about. You will also learn that he sometimes exaggerates and embellishes the truth, especially which he's promoting himself and his

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Opening - Mr. Warshavsky

1 projects.

2 But you will see from the evidence that Mr. Rothschild
3 is straight when it comes to the important things. Like paying
4 back around a \$100,000 investment when the deal fell through.

5 You are going to learn some more things about
6 Mr. Rothschild that will help you understand what shaped him
7 and his artistic outlook. Despite his name, Mr. Rothschild was
8 not handed anything. His birth name is Sonny Alexander
9 Estebal, but he adopted the name Mason Rothschild when he was a
10 teenager for reasons that you will hear him explain.

11 He is a first-generation American, born in Pasadena
12 and raised in San Mateo, California. His mom came to the U.S.
13 from the Philippines; his dad came from Colombia.

14 He graduated from high school at the age of 16, and he
15 took classes at a local community college for a year and some
16 online classes at the University of San Francisco in business
17 and marketing. But Mr. Rothschild never finished college.
18 He's mostly self-taught in both business and art.

19 On the business side, Mr. Rothschild started out
20 working in retail, first for a couple of small streetwear
21 brands and then for bigger companies in the luxury fashion
22 space, like Yves Saint Laurent and Dior. He wanted to get into
23 other things while he was working in retail, so he started
24 doing some consulting work around digital marketing and social
25 media for various companies.

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Opening - Mr. Warshavsky

1 In 2021, Mr. Rothschild and his fiance, Erica Del
2 Rosario, opened a concept store, an artistic community called
3 Terminal 27 in Los Angeles.

4 Six months after it opened, Vogue Magazine named
5 Terminal 27 one of the best fashion boutiques in America.
6 That's the business side of Mr. Rothschild, which you can see
7 involves a lot of creativity.

8 Mr. Rothschild is an artist too. Hermès wants you to
9 believe that Mr. Rothschild can be only one thing; he's either
10 a business guy or he's an artist. But the evidence will show
11 you that he's both.

12 And you will hear that's not unusual. Andy Warhol
13 worked in advertising before he became a famous artist. Plenty
14 of artists have day jobs. Now, Mr. Rothschild is not an artist
15 who paints landscapes or portraits, like Bob Ross or Leonardo
16 da Vinci.

17 You will see from the evidence that Mr. Rothschild is
18 a conceptual artist. There have been many famous conceptual
19 artists who came before Mr. Rothschild like Andy Warhol and
20 Damian Hurst. The evidence will show that Mr. Rothschild, a
21 conceptual artist, is the idea guy. He is not usually the guy
22 who executes the ideas.

23 Like other conceptual artists -- you will see from the
24 evidence that he did this with several -- I'm sorry. Like
25 other conceptual artists, Mr. Rothschild often works with other

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Opening - Mr. Warshawsky

1 people who have the technical skills to bring his ideas into
2 the world. You will see from the evidence that he did this
3 with several of his NFT projects, including MetaBirkins.

4 Mr. Rothschild did not actually generate the MetaBirkins images
5 by himself. He hired an assistant to work at his direction to
6 help him create the images that he envisioned in his
7 imagination.

8 But I want to back up for a minute, because MetaBirkin
9 was not Mr. Rothschild's first art project. You will learn
10 that Mr. Rothschild's first art project that got some attention
11 was in 2015, when he was just 21 years old. His first art
12 project was screen printing a collection of fake art school
13 T-shirts that were lampooning the fact that these fancy art and
14 design schools like Parsons School of Design here in the city
15 sold really ugly school merch that none of its students wanted
16 to wear. So he called the collection Art School Dropout.

17 The press and the art schools got what Mr. Rothschild
18 was doing at the time. This example highlights two important
19 things that you will hear from witnesses in this trial and that
20 I ask you to keep in the back of your mind over the next few
21 days.

22 The first is that art doesn't exist in a vacuum. It's
23 often about context. Sometimes you can't see that something is
24 art unless you know how it fits into the larger context of art
25 history or what's going on in the art world. The second is

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Opening - Mr. Warshavsky

1 that there is a long history of artists who deliberately engage
2 with and blur the boundaries between art and commerce to expose
3 aspects of the world that we live in.

4 And today we live in a world dominated by brands.
5 From McDonald's to Starbucks to BMW to Birkin. Artists often
6 reflect the world that they see around them, so it is not a
7 surprise that there have been artists like Andy Warhol and
8 Mr. Rothschild who play with our consumerist culture and our
9 obsession over luxury goods as their artistic subjects.

10 Now going back to Mr. Rothschild's work as an artist,
11 in 2021, Mr. Rothschild jumped into the world of NFT art.

12 Ashley, would you please put Mr. Rothschild's NFT
13 chair artworks on the screen.

14 This is Mr. Rothschild's first NFT art project that he
15 created in the spring of 2021. I am sure you have seen this
16 kind of thing before, a fancy chair in a fancy store that looks
17 realty tempting to sit in. But there is a sign next to it that
18 says, "Do not sit."

19 So Mr. Rothschild's first NFT art pieces were a
20 comment about that. You can see he created a 3D -- this is a
21 digital 3D chair. It's kind of falling apart. You can see
22 it's covered in plastic. He created two of these, and he
23 called the collection "Do Not Sit."

24 And someone bought one of these pieces of NFT art for
25 the equivalent of \$4,000 at the time, literally just a digital

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Opening - Mr. Warshavsky

1 image of a chair attached to an NFT.

2 Now, there are multiple artistic layers to this that
3 Mr. Rothschild can explain a lot better than I can, and you
4 will hear from him very soon. But you can see that this is
5 art. Around the same time, Mr. Rothschild and another creator
6 had an idea for another NFT art project. They would create a
7 short digital animation depicting a fetus gestating inside of a
8 Birkin bag and call it "Baby Birkin."

9 Ashley, would you please put Baby Birkin on the
10 screen.

11 This was a reference to Hermès Baby Birkin bag. It's
12 the smallest version of the Birkin bag that Hermès sells for
13 around \$9,000 or \$10,000. And you might have seen the children
14 of celebrities like Kim Kardashian carrying this around. In
15 May 2021, the Baby Birkin NFT artwork sold for the equivalent
16 of \$23,500. It also attracted some significant press
17 attention, including from Vogue Magazine.

18 Mr. Rothschild realized he had struck a chord with
19 this. People, especially people who spend crazy amounts of
20 money on NFT art, apparently love the Baby Birkin artwork's
21 silly play on consumer culture and luxury goods.

22 So Mr. Rothschild had idea for a follow-up. He would
23 create a series of digital NFT artworks that would depict
24 imaginary Birkin bags covered in colorful cartoonish fur with
25 some referencing other famous artists like Mona Lisa and

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Opening - Mr. Warshavsky

1 Vincent Van Gogh's "Starry Night."

2 Mr. Rothschild was inspired in part by the discussion
3 around fur-free initiatives in fashion at the time.

4 Ashley, would you please put up the MetaBirkins on the
5 screen.

6 He also wanted to do an artistic experiment, to see
7 where the value in the Birkin bag really lies.

8 Is the value really in the painstakingly handcrafted
9 physical handbag?

10 Or is the value in the image and the illusion that the
11 culture projects on to the physical object?

12 Mr. Rothschild wanted to see if people would actually
13 ascribe a same kind of value to two dimensional digital
14 paintings of imaginary furry Birkin bags they ascribed to the
15 actual physical Birkin bags that Hermès sells.

16 So in October 2021, Mr. Rothschild announced on his
17 social media that he would release a series of NFT artworks
18 depicting imagery, fur covered Birkin bags at the beginning of
19 December.

20 He started previewing some of these artworks on his
21 own social media accounts, and he asked his followers for
22 suggestions for a title for this new series. A couple of
23 people suggested MetaBirkins and Mr. Rothschild ultimately
24 chose that title because he thought it was a great fit for the
25 artworks and the art project as a whole.

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Once he had a title, Mr. Rothschild set up a MetaBirkins.com website and MetaBirkins social media accounts to start building hype and promoting this new series of artworks just like folks in Hollywood do to promote their upcoming blockbuster movie. You will see from the evidence that Mr. Rothschild identified himself as the creator of MetaBirkins, and he never told anyone that Hermès created MetaBirkins.

Now, you heard some of these MetaBirkins sold for tens of thousands of dollars. But you need to understand that Mr. Rothschild did not sell them for that price. Mr. Rothschild initially sold them for approximately \$450 apiece. It was after he released them that other people started buying and selling them on the open market for thousands or tens of thousands of dollars, and Mr. Rothschild got a small percentage of those sales. That was the whole point of his experiment, to see what people would do with these MetaBirkins once they were out in the world.

Now, Mr. Rothschild turned over thousands of his text messages to Hermès for this case. Hermès has combed through all of those text messages trying to find cynical stuff to show you, and all they found were text messages showing Mr. Rothschild doing what artists have always done, trying to drum up interest in his art and promote it. This is not new. Artists in all media have always sought to generate excitement

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1 and interest among the big spenders, the whales of the market
2 for art.

3 Hermès says that this shows that Mr. Rothschild just
4 wanted to make money and wasn't interested in art. But you
5 will see from the evidence that's not true. Mr. Rothschild was
6 just doing all the things that artists do to promote their
7 work. He tried to get interest from celebrities and
8 influencers. He tried to get MetaBirkins in the hands of good
9 collectors and to reward them for supporting his art. He tried
10 to build a community of people who like his art.

11 And Mr. Rothschild has continued to make art since
12 MetaBirkins were released and Hermès filed this lawsuit.

13 Ashley, would you please put Mr. Rothschild's artwork
14 on the screen.

15 Here's a sample of some of the art that Mr. Rothschild
16 has created after he did MetaBirkins. Last year Mr. Rothschild
17 worked with another artist to create and release another NFT
18 project called, "I Like You, You're Weird."

19 You can see that on the left-hand screen, the little
20 weirdo that you see in the upper left corner. They released
21 10,000 of the weirdo artwork you see on your screen here
22 attached to NFTs.

23 On the right, or I suppose it is actually in the
24 middle here, is an artwork that Mr. Rothschild created just a
25 couple of months ago in tandem with the prestigious SCOPE Art

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1 Show in Miami that happened in the same time as Art Basel in
2 dis. Mr. Rothschild was commissioned by the Scope Art Show to
3 create art for an NFT ticket to its show.

4 This is the art that he created. The art is actually
5 an animation. You are seeing a screen shot here. It's like
6 pool floaties, and he called the art "Floaties."

7 By the end of this trial, it will be clear -- oh, I
8 should also point out another art project that he does is here
9 on the right. It's called, "I Hate You, You're Scary." It is
10 one of the little scary figures there. And then down in the
11 lower left-hand corner you see some artwork that Mr. Rothschild
12 did for an F1 racing helmet that is on the helmet. This is all
13 in the last year.

14 Now, by the end of this trial, it will be clear to you
15 that MetaBirkins are art protected by the First Amendment, not
16 consumer commodities or consumer products like Hermès is going
17 to want you to believe.

18 But even if MetaBirkins were just a consumer product
19 that competes with Hermès' products, the evidence will show
20 that Hermès still has no case here at the end of the day,
21 because the heart of a trademark case is confusion,
22 specifically, whether there's evidence that a significant
23 number of relevant consumers were confused or likely to be
24 confused about where the product came from. Hermès spent a lot
25 of money to hire the experts that they showed you, and in

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Opening - Mr. Warshavsky

1 particular an expert to conduct two surveys to see whether
2 consumers were likely to be confused about whether MetaBirkins
3 came from Hermès.

4 You are going see that those surveys actually show,
5 not surprisingly, that the vast majority of people who spent
6 tens of thousands of dollars on fancy French purses or NFT art
7 understood that MetaBirkins did not come from Hermès. At the
8 end of the day, that is all you need to know to find in favor
9 of Mr. Rothschild.

10 At the end of this case, I or one of my colleagues
11 here is going to stand here again closing. And you will see
12 that MetaBirkins are art, that Mr. Rothschild is an artist with
13 artistic intention, that the MetaBirkins title is artistically
14 relevant to the MetaBirkins images because they depict
15 imaginary furry Birkin bags, that Mr. Rothschild wanted the
16 credit for his artwork, he was proud of it, and that nobody
17 paying \$12,000 or more for a luxury handbag was confused about
18 where MetaBirkins came from.

19 And we are going to ask you to find in favor of
20 Mr. Rothschild on all of Hermès claims.

21 Thank you.

22 THE COURT: Thank you very much.

23 Plaintiff will call their first witness.

24 MR. WARSHAVSKY: Your Honor, at this time we call
25 Robert Chavez to testify by video. May we furnish the court

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1 with copies of the exhibits?

2 THE COURT: Ladies and gentlemen, in certain
3 circumstances, and with the consent of both sides, certain
4 witnesses will testify by video. You should evaluate that just
5 as if they were here testifying live.

6 (Video played)

7 (Continued on next page)

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1 MR. WARSHAVSKY: Your Honor, at this point in the
2 transcript, we are about to introduce Exhibit 1 to the witness.

3 THE COURT: Any objection?

4 MR. HARRIS: No objection.

5 THE COURT: Plaintiff's 1 is received.

6 (Plaintiff's Exhibit 1 received in evidence)

7 (Video played)

8 MR. WARSHAVSKY: Your Honor, at this point we would be
9 offering in Exhibit 3.

10 THE COURT: Any objection?

11 MR. HARRIS: No objection.

12 THE COURT: Plaintiff's Exhibit 3 is received.

13 (Plaintiff's Exhibit 3 received in evidence)

14 (Video played)

15 MR. WARSHAVSKY: Your Honor, we're about to show
16 Exhibit 4 to the witness.

17 THE COURT: OK.

18 MR. HARRIS: No objection, your Honor.

19 THE COURT: Exhibit 4 is received.

20 (Plaintiff's Exhibit 4 received in evidence)

21 (Video played)

22 MR. WARSHAVSKY: Your Honor, at this point we are
23 about to turn to Exhibit No. 5 and would offer it into
24 evidence.

25 MR. HARRIS: No objection.

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1 THE COURT: Exhibit 5 is received.

2 (Plaintiff's Exhibit 5 received in evidence)

3 (Video played)

4 MR. WARSHAVSKY: Your Honor, at this point we would
5 offer into evidence Exhibit 6.

6 MR. HARRIS: No objection.

7 THE COURT: Plaintiff's Exhibit 6 is received.

8 (Plaintiff's Exhibit 6 received in evidence)

9 (Video played)

10 MR. WARSHAVSKY: Your Honor, at this point we would
11 offer into evidence Exhibit 7, which are those trademarks.

12 MR. HARRIS: No objection, your Honor.

13 THE COURT: Plaintiff's Exhibit 7 is received.

14 (Plaintiff's Exhibit 7 received in evidence)

15 (Video played)

16 MR. WARSHAVSKY: Your Honor, we're about to offer
17 Exhibit 8 into evidence, which is media coverage.

18 MR. HARRIS: No objection.

19 THE COURT: Exhibit 8 is received.

20 (Plaintiff's Exhibit 8 received in evidence)

21 Counsel, find a time in the next two or three minutes
22 to pause because we want to give the jury their one o'clock
23 lunch.

24 MR. WARSHAVSKY: Your Honor, I think we can pause
25 here.

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1 THE COURT: Very good.

2 Ladies and gentlemen, we'll take lunch now and resume
3 at two o'clock.

4 (Jury not present)

5 We'll see you all at two o'clock.

6 (Luncheon recess)

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1 AFTERNOON SESSION

2 (2:00 p.m.)

3 THE COURT: We are going to go without a break until
4 about a few minutes before 4.

5 How much longer is the video?

6 MR. WARSHAVSKY: The video I think is about 40 minutes
7 longer.

8 THE COURT: Okay.

9 (Jury present)

10 THE COURT: Please be seated.

11 All right. We are ready to resume.

12 (Video played).

13 MR. WARSHAVSKY: Your Honor, AT this point we are
14 about to show Exhibit 9.

15 MR. HARRIS: No objection, your Honor.

16 THE COURT: Plaintiff's Exhibit 9 is received.

17 (Plaintiff's Exhibit 9 received in evidence)

18 (Video played)

19 MR. WARSHAVSKY: At this point, your Honor, we would
20 offer Exhibit 10 into evidence.

21 MR. HARRIS: No objection.

22 THE COURT: Received.

23 (Plaintiff's Exhibit 10 received in evidence)

24 (Video played)

25 MR. WARSHAVSKY: Again, your Honor, at this point we

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1 offer Exhibit 11.

2 MR. HARRIS: No objection.

3 THE COURT: Received.

4 (Plaintiff's Exhibit 11 received in evidence)

5 (Video played)

6 MR. WARSHAVSKY: Your Honor, we would request Exhibit
7 12 be admitted into evidence.

8 MR. HARRIS: No objection.

9 THE COURT: Received.

10 (Plaintiff's Exhibit 12 received in evidence)

11 MR. HARRIS: Your Honor, defendant offers this as
12 Defendant's Exhibit 600.

13 THE COURT: Any objection?

14 MR. WARSHAVSKY: No objection, your Honor.

15 THE COURT: Received as Defendant's Exhibit 600.

16 MR. WARSHAVSKY: Thank you.

17 (Defendant's Exhibit 6 received in evidence)

18 (video played)

19 MR. HARRIS: Your Honor, defendant offers that Exhibit
20 as Defendant's 601.

21 MR. WARSHAVSKY: No objection, your Honor.

22 THE COURT: 601 is received.

23 (Defendant's Exhibit 601 received in evidence)

24 (video played)

25 MR. WARSHAVSKY: Your Honor, that's the end of

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Mentzer - Direct

1 Mr. Chavez's testimony.

2 THE COURT: Very good. Please call your next witness.

3 MR. WARSHAVSKY: Your Honor, Hermès will call
4 Dr. Kevin Mentzer, who is waiting outside.

5 KEVIN MENTZER,

6 called as a witness by the Plaintiff,

7 having been duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. FERGUSON:

10 Q. Good afternoon, Dr. Mentzer.

11 A. Good afternoon.

12 Q. What are the topics you are here to talk to us about today?

13 A. In general, I am here to talk about blockchain NFTs and the
14 relationship of the MetaBirkins NFT in relation to blockchain.

15 Q. And who retained you to provide this testimony?

16 A. Baker Hostetler, attorneys for Hermès.

17 Q. Prior to being retained in this litigation, have you ever
18 worked or performed any work for Baker Hostetler before?

19 A. No, I had not.

20 Q. Prior to being retained in this litigation, have you ever
21 performed any work for Hermès before?

22 A. No.

23 Q. Prior to being retained in this litigation, have you ever
24 testified as an expert before?

25 A. No, I have not.

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Mentzer - Direct

1 Q. Could you look at Exhibit 57 in your exhibit binder.

2 We will give you an exhibit binder. That will help.

3 I ask if you can turn to Exhibit 57 and identify what
4 is shown as Exhibit 57.

5 A. This is a copy of my résumé.

6 Q. And who prepared this document?

7 A. I did.

8 Q. I offer Exhibit 57 into evidence.

9 MR. MILLSAPS: No objection, your Honor.

10 THE COURT: Received.

11 (Plaintiff's Exhibit 57 received in evidence)

12 BY MR. FERGUSON:

13 Q. Dr. Mentzer, can you describe for us what appears on the
14 slide I have just put in front of you.

15 A. This is a slide that I prepared that is a subset of my
16 résumé, focusing in on my education and my professional work
17 history.

18 Q. After high school, did you obtain an advanced degree?

19 A. Yes, I did.

20 Q. What was that?

21 A. My first degree was a bachelor of science in business
22 administration with a concentration in computer information
23 systems from Bryant University.

24 Q. After graduating from Bryant University, did you obtain
25 employment?

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Mentzer - Direct

1 A. Yes, I did.

2 Q. And what was that?

3 A. I was hired initially as a systems analyst for Hanover
4 Insurance Company.

5 Q. Referring to the slide, under the heading of "Professional"
6 there are three entries from 1991 to 2004.

7 Could you summarize the type of responsibilities you
8 had in each of those jobs.

9 A. Sure. I started my career as a systems analyst, which is a
10 combination of business analyst along with some coding
11 responsibilities, so you could refer to me as a programmer at
12 that point. I was promoted to a senior systems analyst
13 basically working on designing software for Hanover insurance.

14 I was using a tool called Progress Software, which is
15 also a programming language. And so I actually went to work
16 for Progress Software shortly after leaving Hanover Insurance,
17 where I was a consultant working with Progress' clients related
18 to programming issues around their language.

19 I left there to found my own company, Counterpoint
20 Technologies Corporation, which was an IT consulting firm where
21 my clients -- focused on software development and system
22 analysis and design for my clients.

23 Q. Did there come a time when you received an advanced degree?

24 A. Yes.

25 Q. What was that?

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Mentzer - Direct

1 A. In 2004 I received my master of science in information
2 technology from Bentley University.

3 Q. Did you have a concentration in obtaining that degree?

4 A. No. That was a specialized degree in IT related to --
5 Bentley is known as a business school, so related to technology
6 related to business.

7 Q. After obtaining your MS in information technology from
8 Bentley University, did you have further employment?

9 A. I did.

10 Q. Can you describe that for us.

11 A. I went to work for a startup called Blue Cod Technologies
12 as their director of software development, where I oversaw a
13 software team responsible for developing a claims processing
14 and policy management system to serve our outsourcing customers
15 in the insurance space. After that I went to work for Energy
16 Services Group, again as a consultant, assisting them with
17 analysis and design along with coding.

18 Q. Did there come a time when you left Energy Services Group?

19 A. Yes.

20 Q. What did you do next?

21 A. I went back for my Ph.D. at that point at Bentley
22 University.

23 (Continued on next page)

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1 BY MR. FERGUSON:

2 Q. And did there come a time when you obtained a Ph.D.?

3 A. Yes.

4 Q. Could you describe that for us?

5 A. I received my Ph.D. in 2016, as I mentioned from Bentley
6 University, which is a business school in Massachusetts. So my
7 Ph.D. is in business with a concentration in business
8 analytics.

9 Q. What is a concentration in business analytics; could you
10 elaborate on that for us?

11 A. From a business perspective, business analytics is all
12 about gathering data to analyze what happened in the past. So
13 it tends to be backwards looking. We gather data from any
14 source that we can and usually use a combination of software
15 tools along with coding to be able to analyze that data to be
16 able to explain what is happening in the organization.

17 Q. Looking at the slide in front of you under the heading of
18 academic appointments, I see you've had a series of academic
19 appointments, is that correct?

20 A. Yes.

21 Q. Could you tell us about the first position, adjunct
22 instructor at Bentley University?

23 A. During my Ph.D. program, after I completed the coursework,
24 I was then hired on as an adjunct instructor at Bentley
25 University to teach business analytics, statistics, and an MBA

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1 course in emerging technologies and the impact that it has on
2 society.

3 Q. Did there come a time when you received a further academic
4 appointment?

5 A. Yes.

6 Q. Would you describe that for us?

7 A. In 2015, one year prior to finishing my Ph.D., I started a
8 tenured track position at Bryant University as an assistant
9 professor in computer information systems department then.

10 Q. Did you obtain further appointment after that?

11 A. I obtained tenure at Bryant, so I was promoted to the
12 associate professor level in 2021.

13 Q. Did there come a time when you received a further academic
14 appointment?

15 A. Yes.

16 Q. Can you describe that for us?

17 A. So in 2022, I was recruited by the president of Nichols
18 College to come work for him, and I was given a title of
19 trustee endowed professor of data science and emerging
20 technologies.

21 Q. Could you elaborate for us what is meant by data science in
22 this context?

23 A. So data science, if we talk about business analytics being
24 backward looking, data science tends to be forward looking. So
25 we're building predictive models to be able to understand or

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1 to be able to predict events in the future.

2 Q. What does it mean to be an endowed professor?

3 A. That's really the highest designation you can get as a
4 professor. It is a select few who get that, and it's a signal
5 that the school recognizes you as a leader in your field. I'm
6 the only one at Nichols College.

7 Q. Referring both to your professional life and then your
8 academic appointments, in the course of your work history you
9 have experience writing computer code?

10 A. That's correct.

11 Q. Would you tell us about that experience?

12 A. It's been extensive over my 20-year professional career as
13 well as my academic career. I've coded in probably a dozen
14 different languages and taught probably a half a dozen
15 different languages and courses.

16 Q. Over the course of your career, have you had involvement in
17 emerging technologies?

18 A. Yes.

19 Q. Could you describe that for us?

20 A. So in the business world, programming-type positions are
21 usually either maintenance roles or kind of new development.
22 My entire career was focused on new development. So I was
23 always utilizing the newer technologies so starting my career
24 publishing client serve development, when it was new, working
25 with companies as the web and the Internet emerged, worked with

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1 kind of outsourcing environments. So really my entire career
2 has been forward looking.

3 Q. Referring to the bottom of the slide, there is, under the
4 heading licenses and certifications, there is a reference to
5 certified blockchain solution architect.

6 Can you explain to us what that is?

7 A. Sure. That's a certification issued by the blockchain
8 training alliance where I had to sit for an exam and pass,
9 which basically tested me on global concepts related to
10 blockchain. So I had to be able to distinguish between
11 private, things like that, all various types of blockchains
12 that are out there, as well as a touching upon the solidity
13 programming language, which is used primarily in the
14 Ethereum blockchain.

15 Q. Prior to seeking the certification, had you had involvement
16 with blockchain technologists?

17 A. I had, yes.

18 Q. When were you first involved with blockchain technologists?

19 A. My first paper I wrote during my first year of my Ph.D.
20 program, that would have been in 2011. I wrote a paper on the
21 impact bitcoin would have on the business community. I also
22 helped found and fund a blockchain club at Bryant University
23 which was responsible for kind of the education of blockchain,
24 as well as I obtained funding to build a crypto mining lab on
25 campus.

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1 Q. When the first paper you referring to, the first paper you
2 wrote on blockchain, what was the dollar value of blockchain
3 when you were first writing about it?

4 A. It was \$4 at that time.

5 Q. That's changed a little bit?

6 A. Yes.

7 Q. Is there a relationship between blockchain and NFTs?

8 A. Yes. NFTs live on the blockchain, so it's the newer
9 iteration of how we're using blockchain.

10 Q. Have you had involvement with NFTs?

11 A. I have. I have, yes.

12 Q. When did you first have involvement with NFTs?

13 A. So I started studying impacts that NFTs have on Ethereum
14 blockchain in fall of 2017 with the rollout of the first
15 commercially successful NFT, one could argue, crypto Cadence.

16 Q. Why did you obtain certification as a blockchain solution
17 architect?

18 A. At that point, I was designing a special topics course for
19 Bryant University to teach blockchain, and I wanted to make
20 sure that my course could prepare my students to take a similar
21 exam.

22 Q. Are you still certified as a blockchain solution architect?

23 A. I am not, no.

24 Q. Why not?

25 A. I used it for the purpose of designing that course and I

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1 didn't see the need to keep up with it.

2 Q. Can you describe what's on the slide I've just put in front
3 of you?

4 A. This is a slide that I prepared that has a subset from my
5 resume of my presentations and roll as conference organizers,
6 with a specific focus on blockchain and NFT.

7 Q. Under the presentation, presentations and panels heading,
8 are any of these presentations particularly related to the work
9 that you did in connection with this litigation?

10 A. Sure. The last one listed there with a student Michael
11 Gaugh, 2018, *The Impact of Cryptokitties on the Ethereum*
12 *Blockchain*. I followed basically the same process that I
13 followed to evaluate the MetaBirkins project for that
14 assignment. So I was looking at transaction level detail of
15 the cryptokitties NFT on the Ethereum market and comparing that
16 to overall volume to see if we truly were seeing lag in network
17 time as a result of this NFT.

18 Q. In the conferences that you've identified as a conference
19 organizer, can you talk about your role as a conference
20 organizer in these conferences?

21 A. Sure. I am responsible for evaluating submissions from
22 other academics. I make the initial decision as to whether the
23 papers should go out for review or not. If I do decide they
24 should go out for review, I find reviewers to go ahead and
25 review those papers. I summarize the comments back and give

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1 that feedback to the authors so they can hopefully revise their
2 papers to the point where it would be accepted for those
3 conferences.

4 Q. And in this capacity, have you reviewed any papers in
5 connection with block chain technologies and NFTs?

6 A. Oh, sure. We see plenty of papers on blockchain and NFTs.

7 THE COURT: Counsel, please approach the sidebar.

8 (Continued on next page)

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1 (At the sidebar)

2 THE COURT: Is defense counsel challenging the
3 expertise of this witness?

4 MR. MILLSAPS: We are not, your Honor.

5 THE COURT: Why are we spending all this --

6 MR. FERGUSON: I'll move along.

7 THE COURT: Yes.

8 Also, please be aware that under Second Circuit
9 precedent, you do not say to the judge, Judge, we offer this
10 person as an expert in such and such, and then look for the
11 judge for a ruling, because it's now exclusively a jury
12 question.

13 MR. FERGUSON: All right.

14 THE COURT: I have to, of course, deal with
15 admissibility, but that's done outside the presence of the
16 jury.

17 MR. FERGUSON: I apologize, your Honor. How should I
18 offer him?

19 THE COURT: You don't offer him at all. You say did
20 you form some experts opinions in this case.

21 (Continued on next page)

22

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1 (In open court)

2 BY MR. FERGUSON:

3 Q. You'll be pleased to hear I'm moving along.

4 In connection with your engagement in this matter, did
5 you form expert opinions, Doctor?

6 A. Yes, I did.

7 Q. Can you summarize for us the topics that you formed expert
8 opinions on?

9 A. I was asked to evaluate the MetaBirkins NFT at a blockchain
10 level so I could explain kind of the impact that the
11 MetaBirkins NFT did have as well as being able to explain the
12 technology of blockchain and particularly NFTs from a
13 technological point of view.

14 Q. What is blockchain?

15 A. In general, blockchain is a distributive ledger. We can
16 think of a distributive ledger as your checkbook is a type of
17 ledger. So the idea being that each line in your checkbook as
18 you're trying to balance your checkbook is a transaction.

19 A blockchain is no more than a series of transactions,
20 but we know the transactions of every participant in the
21 blockchain, on the blockchain. We call it blockchain because
22 we take those transactions and we periodically wrap them up
23 in a block, and then we kind of timestamp that block.

24 We then chain that block to the next block using some
25 hashing algorithms to chain two blocks together. That provides

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1 what we call immunability. I can't change a prior block or any
2 transactions after they've been certified.

3 Q. Could you explain to us what is depicted in this slide?

4 A. So it's to show that we -- that a block is no more than a
5 series of transactions, and then we chain each block to the
6 next block.

7 Q. What's depicted in this next slide?

8 A. So a blockchain is decentralized. So there is no central
9 authority, there is no company behind blockchain, there is no
10 government behind blockchain.

11 So this image I put together to represent that it is
12 truly distributed and really anyone can participate. And as a
13 result of that, you have the entire blockchain available to
14 you, should you want to see it.

15 Q. Are there different types of blockchain?

16 A. Yes, there are.

17 Q. Can you describe those for us?

18 A. The two biggies are -- the two biggest blockchains are also
19 public blockchains. Bitcoin I think we're all familiar with,
20 and then Ethereum would be another large one.

21 Q. Can you explain to us the differences --

22 Let me rephrase that. Are there differences between
23 bitcoin and Ethereum?

24 A. Yes.

25 Q. Can you explain those to us?

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1 A. So this is an analogy that I frequently use with my
2 students to be able to explain them. It's the traditional
3 phone, very good at making calls. That's what we do with
4 bitcoin. It's very good at doing bitcoin-related transactions
5 where you're exchanging the cryptocurrency bitcoin.

6 On the Ethereum blockchain, I refer to that more as
7 the smartphone. It can still make the calls. We can still
8 transfer ether, which is the cryptocurrency, ether or eth, on
9 the Ethereum blockchain, but the design of Ethereum was done in
10 such a way that it let's me invent code on the blockchain as
11 well. So it allows me to do things like create NFT contracts,
12 smart contracts, on the blockchain.

13 Q. What is an NFT?

14 A. I mean, most of us think of an NFT is that picture that,
15 you know, that is associated with it from a technology point of
16 view. An NFT, which is short for non-fungible token, is just a
17 token that -- so you can think of a subway token, right. I
18 have a subway token. I give one to you this week, you give me
19 one back next week. I don't care if you give me the same one
20 back because they have the same value. That would be a
21 fungible token. It's not unique.

22 A non-fungible token means it's unique. I'm going to
23 give you one. I care about it because it has unique attributes
24 that makes it valuable, potentially valuable, or different than
25 the other tokens on there. So a non-fungible token is a way to

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1 say a unique token on the chain.

2 Q. May NFTs be linked to digital files?

3 A. Yes, they are.

4 Q. And are there different types of digital files that NFTs
5 may be linked to?

6 A. Oh, certainly.

7 Q. Can you elaborate that for us?

8 A. That is kind of what this slide represents. It may be
9 linked to an image, like the Bored Ape Yacht Club NFT we're
10 seeing there first. But it could as well be linked to a music
11 file, a movie file, or no file at all, which is why I have a
12 blank circle there.

13 Q. So can you elaborate for us the relationship between the
14 NFT and the digital file?

15 A. So, in general, NFTs do not store the image on the
16 blockchain. Instead, we point to a repository that is usually
17 also on a decentralized network that points to that digital
18 file that we tend to think of as the NFT.

19 Q. What is the role of the smart -- can you explain to us what
20 a smart contracts is?

21 A. Smart contract is the code, usually written in the program
22 language solidity on the Ethereum blockchain which manages an
23 NFT collection. So if I want to transfer the NFT or sell the
24 NFT, I have to go through that smart contract, which does
25 things like validate I'm the true owner of that NFT and I can

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1 validly transfer them.

2 Q. And the smart contract, is that an entry on a blockchain?

3 A. Yes, it is.

4 Q. Is there a reason why the digital file is usually not on
5 the blockchain?

6 A. Yes.

7 Q. Why is that?

8 A. With blockchain technology, we pay fees based off of the
9 size of the transaction. So most people when they are
10 designing their NFTs don't put the actual digital image on
11 chain or on the blockchain because it would cause much higher
12 fees to be able to do transactions with them.

13 Q. Can you explain to us how a transaction on the blockchain
14 works?

15 A. So, in general, all transactions are initiated by a digital
16 warrant. That is what this slide is showing here. We have a
17 digital wallet on both ends, the digital wallet, we don't know
18 anyone on the blockchain because we just know digital wallets.
19 So the digital wallet itself initiates a transaction that could
20 potentially transfer cryptocurrency, could transfer the NFT to
21 another digital wallet.

22 Q. Where are NFTs bought and sold?

23 A. You can kind of buy NFTs really on any site that's been
24 designed to be able to do that type of transactions, but most
25 folks use an NFT marketplace to be able to do those

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1 transactions.

2 Q. And what is an NFT marketplace?

3 A. It's a common website that allows me to authenticate that I
4 own those NFTs, put them up for sale, and potentially auction
5 them off.

6 Q. Can you describe for us what is shown on this slide?

7 A. These are three NFT marketplaces. OpenSea is by far the
8 biggest in this space, but I mentioned Rarible and LooksRare,
9 because we also had MetaBirkins transactions happening on those
10 two marketplaces as well.

11 Q. You've heard already reference to the phrase metaverse.

12 What is a metaverse?

13 A. A metaverse, in general, when we talk about a metaverse,
14 we're talking about usually a vertical reality environment or
15 space. Could potentially be an augmented reality space. But
16 it's the idea that I will have kind of an avatar representation
17 of myself in a vertical space and be able to kind of interact
18 with the virtual environment that's around me.

19 Q. Can you describe for us what is shown on this slide?

20 A. These are just three of the more commonly known metaverses
21 out there, Meta, formerly Facebook, Decentraland, and Roblox.

22 Q. Is there a relationship between metaverses and NFTs?

23 A. Yes, there is.

24 Q. Could you explain that relationship?

25 A. So many believe that the metaverses are going to be driven

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1 based off of blockchain technology and will use blockchain
2 technology to be able to do things like make transactions using
3 cryptocurrencies. And so as a natural extension of that, we
4 feel like the NFTs will also move into those spaces.

5 Q. And are NFTs integrated into any metaverses at this time?

6 A. They are slowly being integrated, yes.

7 Q. I would like you to look at what has been marked as
8 Exhibit 382.

9 Can you identify this for us?

10 A. This is an FAQ from the Decentraland website.

11 Q. And have you seen this before?

12 A. Yes, I have.

13 Q. In what context have you seen this?

14 A. I was interested in learning about how I could integrate
15 NFTs into the metaverse, and so I searched for the way to link
16 an NFT with metaverse, which directed me to this site here.

17 Q. And is this information you considered did in connection
18 with opinions you formed in this litigation?

19 A. Yes, it is.

20 MR. FERGUSON: I would like to offer Exhibit 382 as an
21 exhibit.

22 MR. MILLSAPS: Your Honor, the defendant objects.

23 THE COURT: Well...

24 MR. MILLSAPS: Hearsay and relevance.

25 THE COURT: Sustained.

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1 BY MR. FERGUSON:

2 Q. And do you have an understanding of how NFTs --

3 THE COURT: By the way, the objection is sustained on
4 grounds of hearsay.

5 MR. FERGUSON: All right.

6 MR. MILLSAPS: Your Honor, we would ask that the
7 slide --

8 The slide was taken down. Thank you.

9 MR. FERGUSON: I'm taking the exhibit down.

10 Q. Do you have an understanding of how NFTs can be used in
11 Decentraland?

12 A. Yes.

13 Q. Could you describe that understanding for us?

14 A. You would have the owner of the collection of an NFT can
15 submit to Decentraland instead of 3D files that could be used
16 in conjunction with the Decentraland metaverse without having
17 to change the NFTs on the blockchain.

18 Q. And when this process is filed, how are the NFTs used in
19 Decentraland?

20 How can the NFTs be used in Decentraland?

21 A. The idea being you have a 3D object that could be either a
22 series of avatars or potentially.

23 Q. I would like to talk to you now about the work that you did
24 in connection with investigating the MetaBirkins and ask in
25 particular if you can describe the steps you took in your

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1 investigation?

2 A. OK. I started first by familiarizing myself using publicly
3 available articles on what I was looking for, so I could get
4 familiar with what the NFT looked like and when it was
5 released. I then searched on the major marketplaces to see if
6 I could find the MetaBirkins collection, and I could find it
7 here on the LooksRare marketplace.

8 So I just simply searched for MetaBirkins in the
9 search bar of LooksRare, which popped up the MetaBirkins
10 collection, and I was able to then click to this page to see
11 the MetaBirkins collection validated, that they looked like the
12 MetaBirkins that were being talked about in the press, and I
13 could then navigate to the transactions on the blockchain by
14 clicking where that yellow arrow is, which redirects me to the
15 smart contract related to the MetaBirkins NFT.

16 Q. And can you describe what's shown on this slide?

17 A. So I clicked there and that brings me to a site called
18 Etherscan.io, which is a site that is linked really through all
19 of the major marketplaces now as a source of information. So
20 from here, I can see that the contract and I can see each of
21 the transaction level, the transaction-level details down
22 below.

23 Q. Will you help us understand what is shown on this slide?

24 A. So here I just tried to tie it back to my earlier
25 visualizations. You have transaction, level of detail, that's

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1 what the transaction hashes. That is the transaction-level
2 detail within the block of a blockchain.

3 The method is the method that I called that would have
4 been called in the smart contract itself. So we see transfers,
5 approvals, etc. We have a block itself. If I wanted to see
6 all the transactions in the block, I could do that. And then
7 who initiated that call to that method, along with if somebody
8 received something as a result of that while it received
9 something as a result of that call.

10 MR. MILLSAPS: Your Honor, we object to these slides
11 being shown to the jury. This is not in evidence.

12 MR. FERGUSON: They are demonstratives that have been
13 created by the witness to help explain rather technical
14 concepts that he is talking about.

15 THE COURT: Yes. They will be allowed as
16 demonstratives, but they will not be entered into evidence and,
17 therefore, they will not be given to the jury when the jury
18 deliberates. They can be used now to help follow his
19 testimony.

20 MR. FERGUSON: Thank you, your Honor.

21 MR. MILLSAPS: Thank you, your Honor.

22 BY MR. FERGUSON:

23 Q. So what's the step that you took next?

24 A. So I had confirmed the images are kind of what I expected.
25 So I wanted to validate that this was actually the smart

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1 contract that I -- that was driving that, the collection that I
2 expected it to be. So the order of transactions on the
3 Etherscan site is the most newest first, so I had to go down
4 back, basically, go to the last page and then go to the bottom
5 of the last page to see the first transaction.

6 Q. Did you click where it says last?

7 A. I clicked where I saw last, and then just scrolled down to
8 the bottom, and I could see that the transaction occurred on
9 12/2/2021, and the transaction was to create the MetaBirkins
10 contract. So this matched the date that I was expecting based
11 off of news articles I was reading.

12 Q. And then what did you do next?

13 A. So now I wanted to take a quick look at the smart contract
14 itself, so I went back to the top of this page and selected the
15 contract tab right there, which shows me the actual solidity
16 code related to the smart contract.

17 Q. Can you look at what's been marked as Plaintiff's
18 Exhibit 78.

19 Have you seen that before today?

20 A. Yes.

21 Q. What is that?

22 A. It is all the code that was linked to MetaBirkins smart
23 contract that I found on the Etherscan.io site.

24 MR. FERGUSON: I offer Exhibit 78.

25 MR. MILLSAPS: No objection, your Honor.

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1 THE COURT: Received.

2 (Plaintiff's Exhibit 78 received in evidence)

3 Q. What's the difference between the exhibit we're looking at
4 and the screen we're looking at right now?

5 A. This just breaks it up based off of the various packages
6 that were used. It's the same code. It was all appended
7 together in one file for the other exhibit.

8 Q. So looking at the code for the MetaBirkins NFTs, were there
9 any particular features of this code that you focused on, in
10 any particular line?

11 A. So I started there at line 22, the constructor method,
12 which told me some things that I was interested in.

13 Q. And what did line 22 tell you?

14 A. I could see that they used the ERC 721 template, which is
15 the kind of the early version of NFT templates. I could see --
16 so that tells me that this smart contract drives just the
17 MetaBirkins contract. It can't handle other NFTs. I could see
18 that they named the smart contract MetaBirkins, and they gave
19 it the symbol Meta.

20 Q. What is the significance of the name MetaBirkins appearing
21 in the contract?

22 A. It's just what they chose to name it.

23 Q. Is this contract on the blockchain?

24 A. Yes, it is.

25 Q. Can this name be changed?

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1 A. No, it cannot.

2 Q. What is the reference to Meta, m-e-t-a, that appears next
3 to MetaBirkins?

4 A. That is the symbol. It's not mandatory to have, but in
5 this case they have it here. You can almost think of it as a
6 stock ticker symbol. If I wanted to do a quick search on some
7 of the marketplaces, I could use the symbol instead of the full
8 name.

9 Q. Can you look at what has been marked as Exhibit 80.

10 Have you seen that before today?

11 A. Yes, I have.

12 Q. What is that?

13 A. That is an export out of the Etherscan.io site of all the
14 transactions related to the MetaBirkins smart contract.

15 Q. Is this information you relied on in forming opinions in
16 this case?

17 A. Yes, I did.

18 MR. FERGUSON: I offer Exhibit 80 into evidence.

19 MR. MILLSAPS: No objection.

20 THE COURT: Received.

21 (Plaintiff's Exhibit 80 received in evidence)

22 So let me ask you this, because I'm just a dumb judge,
23 so I'm not following everything and maybe the jury isn't
24 either.

25 The MetaBirkins, a MetaBirkins is an image; yes?

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1 THE WITNESS: Is a what?

2 THE COURT: Image.

3 THE WITNESS: MetaBirkins, no, is the name of the
4 smart contract.

5 THE COURT: It's the name of the smart contract.

6 So we saw earlier images of Birkin bags covered in
7 fur.

8 THE WITNESS: Um-hmm.

9 THE COURT: What do you call those?

10 THE WITNESS: That's the image file connected to the
11 MetaBirkins NFT.

12 THE COURT: OK. So the image file is something that
13 is offered for sale; yes?

14 THE WITNESS: That is the visual representation of
15 what is being offered for sale is the actual token, which to
16 all of us wouldn't really mean anything.

17 THE COURT: I think my question was a yes-or-no
18 question, but OK.

19 So if you go on the relevant website and you want to
20 purchase exclusive use of this image, that's what you
21 ultimately are getting for your money, right?

22 THE WITNESS: That is your expectation, yes.

23 THE COURT: I think the answer to that is yes, right?

24 Can you answer a question yes or no?

25 THE WITNESS: Yes, I can.

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1 THE COURT: So is the answer to my question yes?

2 THE WITNESS: No.

3 THE COURT: No.

4 Then what's the right answer?

5 THE WITNESS: At issue there is the image can actually
6 change in the future.

7 THE COURT: So you've heard of something called money;
8 yes?

9 THE WITNESS: Yes.

10 THE COURT: When a person exchanges money for certain
11 rights respecting a MetaBirkins image, what they are getting is
12 the exclusive right to have that image available and maybe to
13 the originator, true?

14 THE WITNESS: True.

15 THE COURT: Now we're making progress.

16 And if the person who then purchased that opportunity
17 wants to sell it, the originator then gets, pursuant to the
18 smart contract, a percentage of the sale, true?

19 THE WITNESS: Yes.

20 THE COURT: OK. Go ahead, counsel.

21 BY MR. FERGUSON:

22 Q. What is a minting contract in the context of a smart
23 contract -- in the context of an NFT?

24 I'm sorry. Let me start that again.

25 What is a minting transaction in the context of an

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1 NFT?

2 A. So the term minting is used to refer to the initial sale of
3 the NFT.

4 Q. Can you look at Exhibit 65.

5 Have you seen Exhibit 65 before today?

6 A. Yes, I have.

7 Q. Can you identify it?

8 A. It is a screenshot that I took off of the Etherscan.io site
9 that shows the transaction-level details for the very first
10 MetaBirkins NFT that was made.

11 MR. FERGUSON: I offer Exhibit 65 into evidence.

12 MR. MILLSAPS: No objection, your Honor.

13 THE COURT: Received.

14 (Plaintiff's Exhibit 65 received in evidence)

15 Q. Is there particular information on this record that you
16 focused on in your analysis?

17 A. I was looking at the transaction and the value.

18 Q. And what do these entries tell you?

19 A. So this tells me the wallet, that starts 0X278 minted the
20 very first MetaBirkins NFT, number 0, and they paid .1 ether,
21 which at the time was valued at \$451.48.

22 Q. Can you explain what is shown in this slide?

23 A. Yes. This is a slide that represents the date timestamp
24 for each of the NFTs, so I could understand the minting
25 pattern.

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1 Q. Focusing on the horizontal axis, what information is in
2 that axis?

3 A. That's the date and the time.

4 Q. And what's in the vertical axis?

5 A. That's the NFT number. So starting at zero and ending at
6 number 99, the final MetaBirkins NFT that was minted.

7 Q. And what do each of the blue circles in this chart
8 indicate?

9 A. One of the NFTs being minted.

10 Q. I would like to -- can you look at what's been marked as
11 Exhibit 67.

12 Can you identify there document for us?

13 A. Yes.

14 Q. What is that?

15 A. This is a screenshot that shows the first resale of a
16 MetaBirkins NFT.

17 Q. And is this one of the documents you relied on in forming
18 your opinions?

19 A. Yes.

20 MR. FERGUSON: I would like to offer Exhibit 67 into
21 evidence.

22 MR. MILLSAPS: No objection.

23 THE COURT: Received.

24 (Plaintiff's Exhibit 67 received in evidence)

25 Q. In looking at this record, what was the particular

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1 information that you focused on?

2 A. The transaction value, primarily.

3 Q. And what information do you take from these entries?

4 A. So I could see that the first resale occurred shortly after
5 the minting process began. It was number 64. MetaBirkin
6 number 64, that resold for ten ETH, which at the time was
7 \$42,193.20.

8 Q. I would like you to look at Exhibit 55.

9 Can you explain to -- have you seen Exhibit 55 before

10 today?

11 A. Yes.

12 Q. What is it?

13 A. 55 is my entire report, initial report, that was written
14 for counsel.

15 Q. OK. And does this chart appear in Exhibit 55?

16 A. Yes. It's appendix C in that exhibit.

17 Q. OK. What is the information in appendix C?

18 A. This is a spreadsheet that I put together to track each
19 resale for all three marketplaces so I could come one total
20 amounts of the resale value and the royalties.

21 Q. And how did you create Exhibit C?

22 A. All from data that I downloaded off of OpenSea.

23 Q. So looking back at Exhibit 67, would this be an example of
24 the record that you used to drive this compilation?

25 A. Yes.

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1 MR. FERGUSON: I offer Exhibit 55 into evidence.

2 MR. MILLSAPS: Objection, your Honor.

3 THE COURT: Sustained.

4 Q. What is shown in this next slide?

5 A. This is a chart that I put together that showed all of the
6 resales of the MetaBirkins along with the dollar value amount
7 at the time that transaction occurred.

8 Q. And is this chart derived from the compilation that you
9 created that was Exhibit C to your report?

10 A. That's correct.

11 Q. What does the horizontal axis represent?

12 A. They are the unique date timestamps for each resale.

13 Q. And what does the vertical axis represent?

14 A. The value in U.S. dollars of those resales.

15 Q. Now, resales were in ETH, is that correct?

16 A. That's correct.

17 Q. So how did you calculate the U.S. dollar amount for these
18 resales?

19 A. I didn't calculate it. I took it directly off of the
20 Etherscan.io site that does the conversion for me.

21 Q. And what was the information of the Etherscan.io record?

22 A. That would tell me both the ETH value and then the value in
23 U.S. dollars at that date and time.

24 Q. And so each of these blue circles in this chart, what does
25 each blue circle represent?

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1 A. One of the retails.

2 Q. And then looking at the green line that I've just added to
3 that chart, what does that green line represent?

4 A. That represents the timeline while the minting was going
5 on, so I could see when the minting started and ended. So I
6 could compare whether resales were occurring at the same time
7 the minting process was occurring.

8 Q. When the MetaBirkins NFTs were created, were they linked to
9 any digital file?

10 A. Not initially, no.

11 Q. At the time that the minting transactions began, were they
12 linked to a digital file?

13 A. Yes, they were.

14 Q. And what was the digital file they were linked to?

15 A. They were linked to a covered bag image that had some
16 animation that said future home of MetaBirkins.

17 Q. And how did you determine that?

18 A. One of the methods in the smart contract allows the
19 contract owner to set the repository, the point to the
20 repository for those images. So I found the transaction
21 related to that setting and navigated to that repository to
22 look at what the images were at that time.

23 Q. And can you show me, can you describe to me what is shown
24 in this slide?

25 A. The top line is the actual transaction that set the pointer

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1 to where the image files could be found and navigating to that,
2 you are arrive -- I could find this animated GIF file that
3 represented what they would have looked like at the beginning
4 of the minting process.

5 Q. And so when the first three minting transactions took
6 place, individuals were buying MetaBirkins NFTs, is that
7 correct?

8 A. So this was the image linked to the original, the first
9 three minted MetaBirkins, yes.

10 Q. What image were those first three minters purchasing?

11 A. It would have been linked to this image right here.

12 (Counsel confer)

13 Q. And can you look at Exhibit 81.

14 Can you tell us what Exhibit 81 is?

15 A. It's just marked GIF file. I'm assuming that is the
16 animated GIF we're seeing for future home of a MetaBirkins.

17 MR. FERGUSON: I offer Exhibit 81 into evidence.

18 MR. MILLSAPS: No objection.

19 THE COURT: Received.

20 (Plaintiff's Exhibit 81 received in evidence)

21 Q. Did there come a time when the image linked to MetaBirkins
22 changed?

23 A. Yes.

24 Q. Can you describe for us what is shown in this slide?

25 A. After the first three MetaBirkins were minted, I saw a

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1 series of transactions that were setting the base URI so this
2 would, prior to the fourth being minted, so this would have
3 been the last one which set a new repository navigating to that
4 new repository. This is the image that was there at the time,
5 this JPEG image.

6 Q. And is this image on the blockchain?

7 A. No, it's not.

8 Q. Who decides what image the NFT is going to point to?

9 A. That's controlled by the smart contract owner.

10 Q. So the individual purchasing the NFT doesn't have control
11 over how that pointer is going to function, is that correct?

12 A. That's correct.

13 Q. And could you look at Exhibit 83 in your folder.

14 Can you identify that?

15 A. That is the covered bag image that was set after the third
16 NFT was minted.

17 MR. FERGUSON: I offer Exhibit 83 into evidence.

18 MR. MILLSAPS: No objection.

19 THE COURT: Received.

20 (Plaintiff's Exhibit 83 received in evidence)

21 Counsel, find a spot in the next five minutes to break
22 for the day.

23 MR. FERGUSON: Five minutes to break?

24 THE COURT: Find a time in the next five minutes to
25 break for today.

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1 MR. FERGUSON: OK. Thank you.

2 BY MR. FERGUSON:

3 Q. And did there come a time when the image changed, the image
4 linked to the NFT MetaBirkins changed again?

5 A. Yes.

6 Q. And can you tell us what is shown in this slide?

7 A. That top transaction was another pointer to a new
8 repository for the MetaBirkins NFT that happened shortly after
9 the minting process was completed. And at that time, the
10 unveiling of the individual MetaBirkins happened.

11 Q. And can you look at Exhibit 84.

12 And can you identify that for us?

13 A. Yes. That would be one of the images linked to one of the
14 specific MetaBirkins NFTs.

15 MR. FERGUSON: I offer Exhibit 84 into evidence.

16 MR. MILLSAPS: No objection.

17 THE COURT: Received.

18 (Plaintiff's Exhibit 84 received in evidence)

19 Q. Can you describe for us what is shown in this slide?

20 A. It's a combination of the earlier slide that showed the
21 minting history with date timestamp and what the image would
22 have looked like at any given point in time along that history.

23 Q. Using the slide as a reference, how many MetaBirkins were
24 sold using the future home of a MetaBirkins?

25 A. There were three that were sold under that original image.

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1 Q. And how many were sold under the covered veiled image?

2 A. The remaining 97.

3 Q. Were any minting rights sold under the bag image?

4 A. No.

5 Q. Can you describe to us what is shown in this chart?

6 A. This is the same chart we saw earlier that was the resales
7 with the addition of when the actual digital files changed. So
8 the red indicated digital file there would have been the
9 animated GIF image of the covered bag, the yellow would be the
10 covered bag itself, and then the blue would be the unveiling
11 event and when the individual MetaBirkins was revealed.

12 Q. So looking at this chart, the resales that took place to
13 the left of the blue line, what was the image linked to the
14 MetaBirkins when those resales took place?

15 A. They were buying a covered bag image.

16 Q. And is it possible today that the digital file linked to
17 the MetaBirkins could change again?

18 A. It could, yes.

19 Q. Who has the ability to do that?

20 A. The MetaBirkins contract owner.

21 Q. Anybody else?

22 A. No.

23 MR. FERGUSON: Your Honor, I'm kind of at a logical
24 breaking point.

25 THE COURT: OK. Ladies and gentlemen, we are off to a

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1 good start, but it's very important that we start promptly at
2 9:30 to stay on schedule. So be sure to be back in the jury
3 room like about 20 after nine so we can start right at 9:30.

4 Have a very good evening, and we'll see you tomorrow.

5 (Continued on next page)

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1 (Jury not present)

2 THE COURT: So let me show the witness page ten of his
3 expert report. And the title is "What is a MetaBirkins NFT?"
4 The sentence that follows says, "A MetaBirkins NFT is a is a --
5 "is a" is repeated twice, but it's obviously a typo -- is a
6 token on a Ethereum blockchain -- question whether it should be
7 an Ethereum blockchain or a, but, again, inconsequential -- is
8 a token on a Ethereum blockchain that represents ownership of a
9 unique item (a MetaBirkins NFT)."

10 So the unique item is a MetaBirkins NFT; yes?

11 THE WITNESS: Yes.

12 THE COURT: And you accompany that on your report with
13 figure one, sample MetaBirkins NFT, and it's the image, right?

14 THE WITNESS: Correct.

15 THE COURT: So while I understand that you want to
16 your question or want to make a distinction, it seems to me of
17 no consequence whatsoever between the computerized data
18 associated with the image and the image.

19 In your report you identify the image as a MetaBirkins
20 NFT; yes?

21 THE WITNESS: Yes, I do.

22 THE COURT: And you stand by that, do you not?

23 THE WITNESS: Yes.

24 THE COURT: All right. So I thought I asked you
25 whether that was a MetaBirkins NFT. Maybe I misphrased my

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1 question because I can't remember it now exactly.

2 But if I were to ask you tomorrow, are these images
3 what we mean by MetaBirkins NFTs, your answer would be yes?

4 THE WITNESS: That would be correct.

5 THE COURT: All right. You may step down.

6 (Witness temporarily excused)

7 Now I take the liberty of suggesting to plaintiff's
8 counsel that, so far articulated to the jury, this witness and
9 his testimony is being made to be far more confusing than
10 helpful. I intervened because I could see, just from looking
11 at their faces, that the jurors were confused. And I have to
12 say, I didn't think the responses I got from the witness
13 particularly helped.

14 Now in his report, just to take an example, he defines
15 these images as MetaBirkins NFTs. So a question could have
16 been put to him: What's a MetaBirkins NFT? Oh, it's this
17 image here on the screen. And every juror would have
18 understood that.

19 But that's not the way we proceeded. And looking at
20 his report, I notice that, for example, he spends many, many,
21 many pages describing how he computed how much money
22 Mr. Rothschild made over all this. So I was waiting for the
23 question, that I assume hopefully will come tomorrow: How much
24 money did Mr. Rothschild make off of the MetaBirkins NFT sales?

25 And then we would get an answer, and then you could

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1 break it down to minting revenue, royalty revenue, NFT
2 transfers and fees paid, and maybe even get a little bit
3 further into how he computed that.

4 But instead, as near as I can tell, plaintiff's
5 counsel is proceeding on the theory that we first have to tell
6 the jury everything he looked at and how he defined this and
7 how he looked at that line of indecipherable print and only
8 eventually get to the bottom line.

9 If that's the case, one, we'll be here forever with
10 this witness; two, the jury will be hopelessly confused; and
11 three, the court will have no alternative but to intervene and
12 start asking my dumb questions again.

13 So I encourage counsel over the evening to talk with
14 the witness and revise your approach. OK?

15 MR. FERGUSON: May I address that, your Honor?

16 THE COURT: Sure.

17 MR. FERGUSON: All of the questions from this point
18 forward relate to the damages calculation. So we are done on
19 these other topics and now we're moving into the damage
20 calculation.

21 THE COURT: OK. Isn't the first question you should
22 put to him, I would have thought, how much money did
23 Mr. Rothschild make off of all of this?

24 MR. FERGUSON: I will start with that question
25 tomorrow.

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1 THE COURT: That sounds good.

2 MR. FERGUSON: OK.

3 THE COURT: We'll see you all tomorrow.

4 MR. FERGUSON: Thank you.

5 (Adjourned to Tuesday, January 31, 2023, at 9:30 a.m.)

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